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# **JUDICIAL SUPREMACY IN TAIWAN: STRATEGIC MODELS AND THE JUDICIAL YUAN, 1990-1999**

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Thesis submitted for the degree of PhD

2016

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To

Alexander Christoph Fischer

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## ABSTRACT

This thesis explores constitutional judicial review in the Republic of China (Taiwan), assessing the expansion of judicial power between 1990 and 1999. The core of this research project focusses on the Council of Grand Justices of the Judicial Yuan, and the ability of these fifteen Justices to impose their collective will upon other branches of government through judicial decisions that sometimes override executive actions and legislative acts. The power of constitutional judicial review has *de jure* rested exclusively with the Judicial Yuan under Article 78 of the 1947 Constitution of the Republic of China, and the constitutional text places no limitations on the use of such judicial power. On a *de facto* basis, however, the power of the Judicial Yuan has varied considerably since 1947, setting an interesting research puzzle and inspiring the research questions of this thesis: What are the shifting limitations of judicial power? When do Justices review with deference and what encourages judicial assertiveness?

In engaging with these questions, this thesis reconceptualises and contextualises Taiwan's institutional arrangements for constitutional review through strategic accounts of judicial decision-making and the examination of the role of judicial audiences. Building upon Ginsburg's seminal study of Taiwanese courts and his diffusion-of-political-power model, the following chapters will extend the study of constitutional judicial review in a new direction. The diffusion of political power through competitive elections only accounts for the strengthening of the power of the Judicial Yuan in comparison to other competitive branches of government as a general trend. It leaves unexplained why the all-important 1990 case – *Judicial Yuan Interpretation No. 261* [1990] – precedes democratic transition, and why the practical exercise of judicial power then fluctuates between deference and assertion. In order to



understand *Judicial Yuan Interpretation No. 261* [1990] as the original constitutional moment of judicial power in Taiwan, and to assess the important subsequent variations within a more general trend of judicial power expansion, this thesis will expand strategic accounts of judicial decision-making into the realm of an alliance between judiciary and public opinion. The interplay between public support for the Judicial Yuan as an indirect enforcement mechanism and the Justices' strategic alignment with public opinion as a basis for building institutional legitimacy is then further reinforced by the more traditional elements of Chinese legal culture, such as Mencius' indirect democracy. Evidence for these arguments is offered using a combination of quantitative approaches and a series of interviews, as well as special attention to archival research. These combine to offer the researcher a wealth of new material in support of the key argument that the shift towards judicial supremacy in Taiwan during the 1990s is rooted in the Justices' ability to decide strategically and align themselves with public opinion.

This thesis is therefore original in its empirical impetus and unique as regards the novel pieces of evidence it unearths and analyses, in particular the discovery of a repository of official judicial interviews in the National Central Library of Taiwan. In addition, the theoretical ambition of this thesis combines strategic approaches and the study of judicial audiences to Taiwanese constitutional law for the first time.

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# 1: INTRODUCTION

## 1.1 BACKGROUND

The expansion of constitutional judicial power in the Republic of China (Taiwan) reached new heights in the 1990s (Mendel, 1993: 157-189), as the (Grand<sup>1</sup>) Justices transformed the Judicial Yuan from a court that ‘served an authoritarian regime’ (Ginsburg, 2003: 106) into a genuine guardian of constitution. Taiwan’s decade of judicial power expansion began in earnest when the Justices dismissed the martial law-structured National Assembly in 1990, opening the doors for democratisation via court warrant,<sup>2</sup> and ended even more dramatically when they embraced the idea of unconstitutional constitutional amendments<sup>3</sup> (Jacobsohn, 2006: 460-487) in practice in 2000.<sup>4</sup> Jurists and academics from various disciplines have struggled to explain such a dramatic and rapid expansion of judicial power compressed into a single decade.

Taiwan’s story is particularly puzzling because the Council of Grand Justices of the Judicial Yuan (hereafter the Judicial Yuan) that stood behind the period of judicial assertiveness in the 1990s was appointed by Taiwan’s authoritarian regime.<sup>5</sup> How was

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<sup>1</sup> Nomenclature: the best literal translation is the ‘Grand Justice of the Judicial Yuan of the Republic of China’. Although the legal term ‘Justice’ is more commonly used in English and comparative literature, this thesis mostly employs that term when referring to the judicial decision makers which constitute the Judicial Yuan. In addition, this thesis may occasionally refer to the Judicial Yuan as the ‘constitutional court’ if necessary.

<sup>2</sup> *Judicial Yuan Interpretation No.261* [1990].

<sup>3</sup> Other constitutional courts asserted this power as a theoretical possibility but chose not to apply it in practice. Very few constitutional courts actually struck down specific amendments, and even fewer did so for amendments that truly mattered. This makes the Judicial Yuan particularly unique. *See generally Judicial Yuan Interpretation No.499* [2000]. *See also* Chapter 4.7.

<sup>4</sup> Id (promulgated on 24 March 2000, appealed on 28 October and 18 November 1999).

<sup>5</sup> The 15 Justices who dismissed the congress in *Judicial Yuan Interpretation No.261* [1990] were appointed by President (and dictator) Chiang Ching-Kuo in 1985, and the 15 Justices who struck down the unconstitutional constitutional amendment in *Judicial Yuan Interpretation No.499* [2000] were appointed by President Lee Teng-Hui in 1994.

it possible – against the prediction of Dahl’s regime theory (Dahl, 1971: 1-257), Hilbink’s work on Chile (Hilbink, 2011: 1-316) and Ginsburg and Moustafa’s study of judicial reviews in authoritarian countries (Ginsburg and Moustafa, 2008: 1-378) – that the Justices would not only fail to support the regime that appointed them but would actively challenge other branches of government? What is more, why did judicial behaviour change from a Judicial Yuan that would be best described as deferential (Pre-1990; Ginsburg, 2003: 106-157) to one that was extraordinarily assertive after 1990, playing pivotal roles in politics by imposing its preferences upon other policy areas (Wolfe, 1994: 3-16), overriding executive actions and legislative acts (Whittington, 2007: 230-284). In analysing this puzzle, this thesis shall review not only the nature of judicial review (ibid: 1-27) but also the motives (Schubert, 1965: 22-43; Shapiro, 1981: 28-32) behind the judicial decision-making.

We know that institutional design has not changed since the implementation of the ROC Constitution of 1947. It is therefore worth arguing that one source of judicial power for the Judicial Yuan’s political influence is rooted in the original Constitution with its institutional design and highly abstract language. We also know that judicial behaviour changed dramatically despite the fact that the institutional design remained unaltered, hinting at the importance of context in understanding the shift from deference to assertion that characterised the judicial power expansion after 1990. The most prominent explanatory model has been presented by Ginsburg, but scholarship (and Ginsburg himself) has subsequently refined the models that informed Ginsburg’s seminal study. This has shifted attention beyond the political opportunism that the diffusion of power through competitive elections created to an examination of judicial preferences – why and how the Judicial Yuan often made the best use of opportunities to assert themselves, and why they remained deferential at other times. This new field

of research lies at the heart of this thesis, with a special focus on the alliance between the Judicial Yuan and public opinion (Baum, 2006: 25-49; Marshall, 1989: 14-26) which assumes that the Taiwanese Justices decided carefully and strategically (the strategic model) in order to maintain this alliance.<sup>6</sup>

In the field of constitutional design, the implementation of the Constitution requires a great deal of additional interpretation because it is written in abstract terms. However, the institutional power to interpret this Constitution<sup>7</sup> rests exclusively with the Justices (Chen, 2005b: 796-806), placing no limitations on the use of the resulting judicial power (Li, 2007: 206-208). This in turn provides an opportunity<sup>8</sup> for the expansion of judicial power – just as long as the Justices make decisions that are strategically in line with the preferences of their crucial audience (Baum, 2006: 25), namely Taiwan's public opinion (Garoupa and Ginsburg, 2009: 452-457). Based on concepts of strategic behaviourism (Baum, 1997: 89-124), this thesis sets out to observe interactions between the Justices and public opinion, and to assess the expansion of judicial power and its limitations from 1990 to 1999.

This thesis begins by demonstrating that the strategic model (Epstein and Knight, 1998: 1-21) provides important insights, going beyond Ginsburg's diffusion model (Ginsburg, 2003: 106-157) because public opinion in Taiwan was able to influence the Justices in

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<sup>6</sup> *Eg., Judicial Yuan Interpretation No.476 [1999]* (regarding the constitutionality of capital punishment). See also Chapter 9.2.

<sup>7</sup> *Compare* Constitution of R.O.C. § 78 (1947), *with* Constitution of R.O.C. § 171 (1947), and Constitution of R.O.C. § 173 (1947).

<sup>8</sup> The institutional design of Taiwan's Judicial Yuan has not changed since the foundation of the ROC Constitution in 1947, but judicial behaviour changed after 1990. This could result in only one outcome – the foundation of a new key variable: an alliance between the Judicial Yuan and public-opinion, in order that the Justices could behave differently by exercising their constitutional powers to the maximum. It is therefore necessary to emphasise the Justices' theoretical constitutional powers.

terms of judicial decision-making.<sup>9</sup> This confined the expansion of Taiwan's judicial power within effective political limits,<sup>10</sup> despite the fact that such an expansion of power was not subject to normal institutional checks and balances. Secondly, this thesis transcends the classical framework of separation of powers games (Li, 2000: 37-63) and expands the strategic paradigm into the realm of public opinion inspired by Baum's idea of judicial audiences, (Baum, 2006: 79-87). The evidence presented in this thesis – in the form of 38 official Judicial Yuan interviews with Taiwan's Justices and elder judges, 12 personal interviews with Justices, judges, constitutional draftsmen, politicians and senior journalists and 37 crucial articles, books, biographies written by key people in the 1990s – leads us in an entirely new direction. This thesis concludes that the Justices of the Judicial Yuan pay more attention to public opinion than to any other element we have come to associate with judicial decision-making (Segal and Spaeth, 2002: 44-114; 424-428). As such, this thesis aims to verify that public opinion is the most important guide for the Judicial Yuan, and it has forced the Justices to accustom themselves to making strategic decisions in return for the support of public opinion, thereby providing indirect democratic legitimacy (Mencius<sup>11</sup>) or an indirect enforcement mechanism (Vanberg, 2005: 1-178). This means that whilst the Justices<sup>12</sup> may oppose other branches of government, alliances between them and public opinion

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<sup>9</sup> E.g., *Judicial Yuan Interpretation No.475* [1999].

<sup>10</sup> E.g., *Judicial Yuan Interpretation No.476* [1999].

<sup>11</sup> Mencius is one of the most important political theorists in Chinese history, and his political philosophy remains highly influential in Chinese civilisations, and hence for the cultural and intuitive dimensions of Taiwan's Justices. Mencius is honoured as the China's Second Sage, after Confucius. For detailed discussions of Mencius' ideas, *see generally* the section on indirect democratic legitimacy on Chapter 1.7 and Chapter 4.4.

<sup>12</sup> Apart from providing more accurate and sophisticated explanations of the Judicial Yuan's decision-making and judicial power variations in the 1990s, public opinion also matters as an indirect enforcement mechanism corresponding with important cultural dimensions of the Judicial Yuan's legitimacy (Mencius' indirect democratic legitimacy). Apart from empowering the court against other branches of government, this thesis will also present examples in which the Judicial Yuan did not dare to confront public opinion, despite the fact that the actual preference of the Justices was different from the final vote. This reflects strategic decision-making, rejecting the attitudinal model.

can also narrow down their decisions to a much narrower range of choices<sup>13</sup>, and Taiwan's Justices are fully aware of these political costs.

To build better models of the highest court of decision-making in Taiwan, this thesis often employs a 'but for' causation analysis. As a first step, Taiwan's Constitution is explored as a possible textual restriction of judicial power expansion: are there textual elements linked to jurisprudence and judicial doctrines of interpretation that have consistently stood in the way of judicial power expansion over time? If such textual constitutional restrictions cannot be found, then formal legal explanations of judicial decision-making can be set aside for Taiwan. It has already been argued that the formalist-realist divide is often overplayed<sup>14</sup> (Tamanaha, 2010: 181-199), but in Taiwan – with a highly abstract constitution and a judiciary that apparently values being assertive in terms of culture and the role of the judge – the textual models fail to explain what the judicial decision makers do. We must therefore use context and other models to understand the workings of the court. As a next step, the attitudinal model<sup>15</sup> is tested and ruled out for Taiwan – there is no single case in the 1990s where the Justices played against public opinion, and the only thing we can conclude is that they actually changed the prosecutorial system in accordance with public opinion.<sup>16</sup>

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<sup>13</sup> Taking *Judicial Yuan Interpretation No.476* [1999] as an example, Justices who clearly supported the abolition of capital punishment not to make themselves heard because they knew that the majority of Taiwanese citizens supported capital punishment. If the Justices had to refrain from provoking the public, their choice was *de facto* limited.

<sup>14</sup> Taiwan's judicial decision-makers are constantly expected to be both legal realists and formalists because of the cultural role of the judge – which somehow makes the realist-formalist divide meaningless in this country. See also Chapter 1.8.

<sup>15</sup> In theory the Justices can decide in accordance with their political preferences (the attitudinal model) as long as there are no constitutional restrictions against them (Segal and Spaeth, 2002: 44-114). However, if the Justices always decide strategically (strategic model) despite the fact that there are no constitutional restrictions against judicial power expansion, this implies that non-constitutional restrictions exist.

<sup>16</sup> *Judicial Yuan Interpretation No.392* [1995]. See also Chapter 8.4.

The textual and attitudinal models both fail to yield convincing evidence for Taiwan's apex court's judicial decision. As a standard separation of power games between different branches of government, the game-playing strategies show how crucial public opinion was in the 1990; as long as the Justices decided in accordance with public opinion at the time, the executives and the legislature could only choose to comply, instead of making another *Burmah Oil* case.<sup>17</sup> This thesis will therefore examine how important public opinion was in terms of judicial power expansion in Taiwan, shifting Taiwan's judicial decision-making towards the strategic model. In other words, this thesis aims to demonstrate that Taiwan's Justices decided strategically because of public opinion in the 1990s, even though there were absolutely no constitutional restrictions against the expansion of their power.

Overall, this thesis will provide an empirical paradigm of judicial power expansion based upon the strategic model, and will also explore why the attitudinal model failed in Taiwan. The emerging hypothesis of this thesis is built around the following:

1. Justices would maximise their political preferences only when they were not politically threatened. If Justices had to find a political ally, they maximised their judicial political preferences only when their political allies shared or refrained from offering an opinion of their own<sup>18</sup> (indirect enforcement mechanism).

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<sup>17</sup> *Burmah Oil Company Ltd v. Lord Advocate* [1965] AC 75.

<sup>18</sup> The term 'does not care' was used by Justice Herbert H.P. Ma when he explained the interaction between public opinion and the Judicial Yuan. He said clearly that public opinion simply 'does not care' what the Justices had decided in some cases (Interview with Ma on 19-JUL-2013).

2. Justices could obtain democratic legitimacy even though they were not elected. As long as public opinion was in favour of the Justices, neither congressmen/women nor elected officials would dare to challenge the Justices' political authority (indirect democratic legitimacy).

Given that Taiwanese legal and political studies are a rare phenomenon in the UK, there will be two chapters introducing the theories discussed in this thesis – Chapters 1 and 4 – which are designed for different purposes. Chapter 1 introduces the way the Judicial Yuan and its inferior courts operate. The chapter introduces a court system that pays very little attention to the English-speaking world. The Taiwanese judiciary is mainly based upon German<sup>19</sup> jurisprudence, but in terms of legal transplantation, there are always different understandings of the same doctrine. Chapter 1 is therefore designed to introduce the Taiwanese court system via the Taiwanese interpretation of legal-constitutional theories and political-philosophical ideologies that are commonly applied worldwide, along with ancient Chinese political doctrines. Chapter 4 is constructed around theories that examine the newer decision-making model of the Judicial Yuan. The chapter addresses legal and political theories that are applicable in explaining why and how the Justices behaved in the 1990s. There is no denying that Chapters 1 and 4 may cover the same ground, but both chapters are necessary as they examine the problem from different angles.

As a next step, important key phrases and concepts are clarified. Based on this, Chapter 1 explains the relationship between Taiwan's Justices and public opinion through

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<sup>19</sup> For this reason, this thesis applies German legal terms if there is no similar concept in English. Taiwanese legal terms can be translated into German without gaps and for English academics, it is generally easier to understand German than Chinese.



specific examples, thereby moving from a standard legal doctrinal analysis of Taiwan's judicial decision-making towards a judicial-political study that makes a fuller use of interdisciplinary analytical processes.

## **1.2 TAIWAN, CHINA AND CHINESE**

There are *de facto* two China(s) in the world – the nationalist Republic of China – the ROC (Taiwan), founded in 1911 – and the communist People's Republic of China, the PRC, established in 1949. The *de jure* relationship between the ROC and PRC has always been complex, and the related politics (domestic as well as international) even more so; this complexity becomes relevant on a practical level in Chapter 9.3, which discusses *Judicial Yuan Interpretation No.328* [1993]. To isolate this thesis from the very outset from the passionate politics that the use – or avoidance – of a single word can trigger both in the ROC and in the PRC, it seems worthwhile to stress the fact that the two China(s) do not presently belong to each other, and those who propagate a One China Policy implicitly acknowledge the presence of opposing views and the reality of two different systems of government.<sup>20</sup> Meanwhile, those who demand a declaration of independence for Taiwan inherently acknowledge the fact that there is no such independent country named Taiwan.

Some Taiwanese academics currently avoid using the term 'China' altogether because the word is taken to refer to the communist PRC in contemporary and especially global discourses. Similarly, some Western academics prefer the term 'Taiwan' instead of 'China' because Taiwan is *de facto* not part of the PRC. However, it would be

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<sup>20</sup> To use Germany as an example, it would no longer make sense to talk about 'One Germany' or 'Dachtheorie' after reunification; the discourse of unity required the reality of division.

impossible to engage with Taiwan's legal system without using the terms 'China and Chinese' because the Constitution is unaware of, and thus does not recognise, the term 'Taiwan', and the same applies to all relevant legislative acts, executive orders and judicial decisions. Within the entire Taiwanese legal realm, the official terminology of 'Republic of China' is used exclusively. Hence, within this thesis on Taiwan's Judicial Yuan and Constitution, the words China and Chinese refer to the ROC, the subjects of Imperial China, as well as people who are full-rights-citizens of the ROC; of course, these citizens today mainly refer to themselves as Taiwanese – even though their passports say 'Republic of China'.

### **1.3 LEGAL LANGUAGE IN TAIWAN**

The language of the Taiwanese legal system has three implications. Firstly, the use of classical Chinese implies the highest levels of abstraction (Cao, 2008: 123-125), so the word count<sup>21</sup> of the ROC Constitution is similar to other short constitutions.<sup>22</sup> What is more, the ROC Constitution does not even try to bind the Justices and judges through specific details. The high levels of linguistic (ibid) as well as contextual<sup>23</sup> abstraction empower the Justices and judges constitutionally from the start, although they basically supported the authoritarian regime before the 1990s. In fact, the ROC Constitution has not changed so much as a word, remaining exactly the same constitutional text that says the Constitution 'is what the judges say it is' (Hughes, 1908: 139), despite the fact that

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<sup>21</sup> In terms of length, the ROC Constitution of 1947 is not amongst the shortest. This is because it embodies fundamental national policies. Apart from those articles, the Constitution's word count is very low. For example, the most important chapter of the Constitution, the fundamental rights chapter, only consists of 18 articles and 600 Chinese characters. Considering that this chapter is applied in almost all litigations in the Judicial Yuan, 18 articles written in only 600 Chinese characters illustrates the highly abstract linguistic nature of the legal text.

<sup>22</sup> For example, the US Bill of Rights consists of 568 English words, whilst the fundamental rights chapter of the ROC Constitution (in its official English translation) consists of 591 words.

<sup>23</sup> Constitution of R.O.C. Chapter 7 (1947).

the Justices have changed their decisions dramatically since 1990, actively striking down the authoritarian regime. In order to understand this legal-historical complexity and address how and why the Justices changed their mind by re-interpreting the ROC Constitution,<sup>24</sup> we have to look at the context and the institutional organisation of the Judicial Yuan. This thesis has no intention of claiming that legal formalism is completely incompatible in Taiwan, but it appears that this legal formalism – exemplified by judges finding the law and theories of judicial decision-making restrained<sup>25</sup> by the legal context of the constitution – never made sense in Taiwan’s constitutional litigation because of the highly abstract nature of classical Chinese.

Secondly, as well as high levels of abstraction, classical Chinese grammar is exceptionally complex (Li, 2016: 416-418) and adds a multitude of interpretative options when judicial decisions ascribe meaning to linguistic symbols (legal indeterminacy; Kress, 1989: 283-337). The wide use of pronouns and generalised nouns characterises classical Chinese as a profound but abstract language, and the massive use of abbreviation on verb tense as well as static morphological features opens the language to even more interpretation. In other words, classical Chinese requires grammatical interpretation by nature, making the language extraordinarily indeterminable (Cao, 2008: 123-125; Li, 2016: 416-518). The role of classical Chinese takes indeterminacy to a whole new level,<sup>26</sup> yet it makes up a fundamental

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<sup>24</sup> E.g., *Judicial Yuan Interpretation No.261* [1990].

<sup>25</sup> In *Judicial Yuan Interpretation No.185* [1984] the Justices concluded that their decisions are deemed part of the Constitution (Li, 2000: 45-51); in *Judicial Yuan Interpretation No.261* [1990] they dismissed the then congress, and in *Judicial Yuan Interpretation No.499* [2000] the 5th constitutional amendment (1999) was declared unconstitutional – evidence that shows it would be naïve to discuss legal formalism in Taiwan.

<sup>26</sup> The best example concerns Taiwan’s debate on whether or not the Constitution intends to prohibit precedent. Because Article 80 of the Constitution dictates that ‘[j]udges shall be above partisanship and shall, in accordance with law, hold trials independently, free from any interference’, it is commonly interpreted in Taiwan’s judiciary that the Constitution ‘linguistically’ prohibits precedent (Li, 2014: 60-68) – despite the fact that many legal academics disagree (ibid). What is more, the debate on precedent becomes undebatable when it comes to the Judicial Yuan – because Article 77 states that the Judicial

characteristic of the Taiwanese constitutional system.<sup>27</sup>

Thirdly, classical Chinese is as far removed from contemporary native Chinese speakers as Latin is to contemporary Europeans. This is not just the few technical Latin or foreign terms or phrases that crop up in most legal systems, but a genuine and massive linguistic gap<sup>28</sup> between legal experts and those who have never studied law. The Taiwanese rule of law doctrine includes the concept of legal clarity<sup>29</sup> but this is not concerned with the use<sup>30</sup> of classical Chinese.

## 1.4 PUBLIC OPINION

Perhaps the best definition of the term ‘public opinion’ as it is used in this thesis is proposed by Hans Speier, and underscores the unilateral communication between ‘the citizens and their government’ (Speier, 1950: 376), on which Chinese bureaucracy has depended for thousands of years:

Public opinion, so understood, is primarily a communication from the  
citizens to their government. [...] If a government effectively denies the

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Yuan is the supreme judicial body of the ROC, and that a Judicial Yuan’s decision shall be deemed part of the Constitution which supersedes precedent. In other words, Taiwan is a country that paradoxically has no precedent, despite the fact that its Justices’ decision remains part of the Constitution. *See generally Judicial Yuan Interpretation No.185* [1984].

<sup>27</sup> Because the Constitution is linguistically abstract, its implementation must rely on judicial decisions, which function as *de facto* judge-made-laws. For example, there is only an abstract principle regarding the freedom of speech embodied in the Constitution and it is likely to authorise the Justices of judicial law-making power in determining what should be deemed as the freedom of speech in Taiwan. *See Constitution of R.O.C. § 11* (1947).

<sup>28</sup> For example, in 2012, a former Member of the Legislative Yuan complained publicly that he could not understand an official document of the Legislative Yuan because it is written by classical Chinese (Ho Meng-Kuei: Central News Agency 05 March 2012).

<sup>29</sup> *E.g., Judicial Yuan Interpretation No.432* [1997]. *See also* Lord Bingham: ‘the law must be accessible and so far as possible intelligible, clear and predictable’ (Slapper and Kelly, 2015: 37).

<sup>30</sup> No judicial decision regarding legal clarity has been made due to the use of classical Chinese – and no case on the matter has even been discussed.

claim that the opinion of the citizens on public matters be relevant, in one form or another, for policy-making or if it prevents the free and public expression of such opinions, public opinion does not exist. (ibid)

Speier probably had no intention of arguing that analytical tools are necessary in order to read public opinion; however, it is definitely true that for 2400 years Chinese bureaucrats decided what should be deemed public opinion without referring to sophisticated methodology, since Mencius constructed the theory of indirect democratic legitimacy (King, 1993: 57-62). In other words, it would be considered unjust to criticise a Chinese official who never read public opinion, because no public opinion surveys were performed 2400 years ago. However, it is reasonable to assume that Mencius arbitrarily decided what form of public opinion should take. Such decision-making processes have been used for thousands of years, and precisely reflect the way the Judicial Yuan read public opinion in the 1990s.

In England, according to John Locke, public opinion since the late 17th century was deemed to be 'equal in importance to civil and divine law' (Ferguson, 2000: 6). In Taiwan, it is considered a measurable facet of good governance even today (King, 1993: 57-62). Linguistically, public opinion and 'the voice of the people' (Dicey, 1914: 19) are synonyms in Chinese, and public opinion in Taiwan has been placed at the centre of constitutional arguments, as Dicey argues:

The experience, at any rate, of democratic countries where the constitution provides a regular mode of appeal from the legislature to the people, proves that the voice of the people may be just as ready to check as to stimulate the energy of parliamentary law-makers. (ibid)

If we choose to understand public opinion in a philosophical sense, there can be no denial of the existence of public opinion as claimed by classical political philosophers. According to Speier (1950: 377) ‘John Locke pointed out that men judge the rectitude of their actions according to three laws, namely, the divine law, the civil law, and the law of opinion or reputation’. However, Rousseau ‘speaks of public opinion positively and celebrates it as the guardian of public morality ... public opinion forms the real constitution of the state’ (Sheehan, 2009: 64). Moreover Kant, according to Jürgen Habermas, held that ‘legislative laws based on public opinion’ represent the genuine public law (Nixon, 2011: 89). Mencius, according to Li (2012: 128-135) associated public opinion with legitimacy. In a nutshell, the aforementioned political philosophers had no doubt about the political influence of public opinion, and they all believed that public opinion was at the core in politics.<sup>31</sup> Political scientist Elisabeth Noelle-Neuman (1991:257) commented:

It is not only governments that are subject to the pressure of public opinion. Every individual, every member of society, is subject to the pressure of public opinion. John Locke wrote in the late seventeenth century that there is not 1 in 10,000 who remains untouched when public opinion turns against him. To quote James Madison, one of the US Constitution’s founding fathers: ‘If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much on the number he supposes to have entertained the same opinion. The

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<sup>31</sup> For Locke it was part of the law, for Rousseau it was the real constitution of the state, for Kant it represented the ideal of public law, and for Mencius it stood for the legitimacy of governance.

reason of man, like man himself, is timid and cautious, when left alone; and acquires firmness and confidence, in proportion to the number with which it is associated'. Thus it has been known since antiquity that public opinion exerts pressure on the government as well as on every individual in society. But how this pressure develops and functions is a subject that social research has yet to deal with successfully.

However, when we aim to describe public opinion in a more sophisticated manner, we are forced to conclude that no readily acceptable definition exists. The Round Table on Political Statistics of the National Conference on Science of Politics in 1924 even suggested that it would be wise to 'avoid the use of the term public opinion, if possible' (Hall et al., 1925: 124), even though 'twenty-three methods by which opinion might be measured were suggested for consideration' (ibid). Uncertainties in definition do not result in the criticism of proposed research methods simply because academics from the humanities 'have no qualms about assuming its existence' (Binkley, 1928: 390), despite the fact that 'it perplexes sociologists, political theorists' (ibid: 389) and thus jurists. For example, the broader definition offered by political scientist Valdimer Key (1961: 14) is that public opinion represents:

[T]hose opinions held by private persons which governments find it prudent to heed. Governments may be compelled toward action or inaction by such opinion; in other instances they may ignore it, perhaps at their peril; they may attempt to alter it; or they may divert or pacify it.

Like Speier's definition, Key's take on public opinion still fails to tell us precisely who these 'private persons' are. However, both definitions clearly show how governments

will respond when they sense political pressure. Public opinion exists when a government accepts ‘the claim that the opinion of citizens on public matters be relevant’ (Speier, 1950: 376) because ‘governments find it prudent to heed’ them (Key, 1961: 14). In the case of Judicial Yuan in the 1990s, this definition is more than adequate because the Justices never intended to discover exactly who constituted public opinion (at least as far as this thesis is concerned), although we can observe that the Justices considered some ‘voices of the people’ (Dicey, 1914: 19) to constitute public opinion, and behaved accordingly.

In other words, even political scientists have acknowledged that ‘there is no generally accepted definition’ of public opinion (Davison, 1968: 188). However, there is an acceptable definition of public opinion, depending on ‘its different uses’ (Price, 1992: 4), and this thesis concludes that public opinion represents political pressure from the public as it is received or inferred by the Justices in their examination of how the decision-making process influences the eventual result.

[S]trong currents of public opinion [are] difficult to determine. [...]

Studies find that the attitudes of some Supreme Court Justices change, consciously or not, in response either to long-term shifts in the public mood or to the changing social forces that underlie them. (Epstein et al., 2013: 88)

In order to understand how *vox populi* may be considered as public opinion, we shall address the factors that influence the Justices psychologically and socially. This thesis therefore proposes traditional legal-cultural (Shapiro, 1981: 157-193) and judicial self-interest (Marshall, 1989: 131-166) evaluations. According to Noelle-Neumann, ‘it is



fairly easy to find out which opinion can be expressed openly without any negative sanctions – the “public opinion” – and which cannot’ (Schoenbach and Becker, 1995: 325) because ‘humans, as social beings, have a “quasi-statistical sense” making them aware of which opinion is fashionable and which is not’ (ibid). The Justices therefore had every reason, either from the perspective of traditional legal culture or judicial self-interests, to make good use of their ‘quasi-statistical sense’ (ibid) on decision-making. This meant that the Justices would be motivated to decide which voices of the people should be deemed important to their decisions, either ‘consciously or not’ (Epstein et al., 2013: 88).

Mencius constructed a theory of indirect democratic legitimacy, and this theory founded the general relationship between the ruler and the ruled in China for thousands of years (Li, 2012: 50-52). Mencius saw public opinion as fundamentally relevant to China’s political system (Li, 1999: 169). The legitimacy of both decision-maker and decision depends on its congruence with public need (Dunstan, 2004: 325-326), such as American sex discrimination cases in which Epstein and Kobylka suggested that court decisions reflected public opinion (Erickson and Simon, 1998: 152). The echoes of Mencius’ political theories resonate through many judicial decisions.<sup>32</sup> Justices Herbert H.P. Ma and Wu Geng said:

In terms of whether the Justice of the Republic of China take public opinion seriously or not, [and] the question of whether [they] read public opinion or not, I think, speaking overall, it is nearly impossible for a jurist in the Republic of China, including Justices and judges, to

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<sup>32</sup> E.g., *Judicial Yuan Interpretation No.261* [1990]; *Judicial Yuan Interpretation No.392* [1995].

completely ignore social reactions [...] <sup>33</sup> (Interview with Ma on 19-JUL-2013)

[S]ince being commissioned as a Justice, I have always made decisions humbly and cautiously. During my 18-year career as a Justice, the only aphorism in my mind has been a phrase by Zhuge Liang in the Manifesto Before Military Expedition: ‘Ever since [I] received such a responsibility, [I] have been feeling anxious day and night because [I] fear that [I] may not accomplish the task and will tarnish the Late Emperor’s reputation’. Of course, there is no emperor nowadays, but there is concern with mass public opinion instead, along with our law society’s criticism [...] <sup>34</sup> (Interview with Wu on 19-OCT-2004)

In addition to Mencius, Vanberg’s indirect enforcement mechanism (Vanberg, 2005: 1-178) provides another dimension in which to analyse Taiwan Justices’ decisions. If the Justices pursue self-interest (Chapter 8) or are harmed (Chapter 9) by public opinion, they would choose to decide in accordance with it.

Public opinion in Taiwan is no longer ‘difficult to define’ (Rosillo-López, 2017: 18), and can be observed from political-sociological standpoints (Weakliem, 2005: 227-246) because morality and reputation are attached to public opinion, which functions as judge and jury, as Charles Duclos argues (Walton, 2009: 22-23). Mencius’ indirect democratic legitimacy, along with Vanberg’s indirect enforcement mechanism ‘may be for the building of a reputation with a view to further aims, but it is also a very important

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<sup>33</sup> Author’s Translation.

<sup>34</sup> Author’s Translation.

final, direct motivation’ (Kolm, 1996: 399). Judges are also ‘public men judged in this way by public opinion. The state of this opinion is often a means to future power by election or choice’ (ibid).

Public opinion is something you can’t discount. No judge wants to be seen to be unpopular or out of step with what are held up to be community values. Vast numbers of judges uphold these values, but one has to ask are they subconsciously affected by popular opinion?  
(Mackenzie, 2005: 139)

Whilst the different chapters that make up this thesis explore different dimensions of the nexus between public opinion and the Judicial Yuan nexus, the core understanding remains married to a conceptualisation of public opinion as the judges’ understanding of the distribution of the political preferences of Taiwanese citizens. The thesis presents case studies in which the Justices received third party analyses of how these preferences are controlled by the media; this thesis also advances evidence in Chapter 5 showing that the Judicial Yuan actively pursue a great deal of judicial data analysis. Lastly, this thesis compiles case studies in which the Justices simply rely on empirical idealism – their imagined<sup>35</sup> understanding of what the public expects.

## **1.5 SELF-INTEREST AND CULTURAL BIAS**

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<sup>35</sup> The Judicial Yuan is a court that only decides crucial and *per incuriam* cases, so that the Justices in most cases can rely on their imagined understanding of public opinion. It is pointless to criticise the Justices for accuracy, because in many of these cases, everyone knows where public opinion stands. Taking the case on capital punishment as an example, there is no need for the Judicial Yuan to do any form of statistical analysis if they simply want to know public preference – that is a given. Public opinion surveys were simply for confirmation or academic purposes in this case. *See generally Judicial Yuan Interpretation No.476* [1999].

This thesis upholds the Western theory that human beings are tending to pursue self-interests as a powerful analytical tool. Western scholars – in particular Posner (Stout, 2011: 36-37) – have used a *homo economicus* approach to raise fascinating research questions about self-interest and judicial decision-making. Based on his interdisciplinary background, Posner reframes the way we think about a judge in a court from an economist's perspective: what is the judge maximizing (Posner, 1993: 1-41)? According to Posner, 'judges are rational, and they pursue instrumental and consumption goals of the same general kind and in the same general way that private persons do' (ibid: 39). This thesis has no doubt about Posner's conclusion. However, the thesis shall particularly highlight Eric Posner's opinion, a norm-based model observation that strengthens his father's ideas:

The curious persistence of the *homo economicus* account in the norms literature has been forthrightly explained by Eric Posner, a son of Richard who is himself a prominent legal scholar. The young Posner observes that 'people appear to obey norms both in order to avoid being sanctioned by others ("shame") and in order to avoid being sanctioned by their own conscience ("guilty").' (Stout, 2011: 36-37)

Based on Posner's *homo economicus* approach and norm-based model, this thesis will deem judicial decisions decided in accordance with social and cultural norms as judicial self-interest. However, this thesis will stress that displays of self-interest may vary as a result of diverse cultural biases. Here is a good example:

Confucius honoured those who die for righteous causes and Mencius admired those who sacrificed their lives for justice. Because I have

devoted my whole life to what I found to be just, I am proud to profess that I am righteous at the time of my execution. What I have done indicates what I have learnt from our sages, and right now I no longer feel I have failed my beloved fatherland.<sup>36</sup> – Wen Tian-Xiang (1283)

Duke Wen Tian-Xiang of the Imperial Chinese Song dynasty (960-1279) was captured by the Mongol Empire in 1278. Kublai Khan admired him, and offered him two options, either to serve Kublai Khan or be executed. The duke was steadfast in his choice of execution. The above note, in which he told the Chinese descendants why he refused to surrender, was discovered after his execution. As a Han Chinese, his loyalty to China was a matter of principle. In the light of Western realist thought, he gave priority to his reputation<sup>37</sup> (Olsthoorn, 2015: 61-62).

Duke Wen Tian-Xiang's choice in 1283 illustrates the concept that people may not always consider political position and wealth as a priority when making political decisions. Sometimes a good public reputation amongst the public is more politically honourable. As a matter of fact, Duke Wen has become a public symbol for loyalty and honesty as ideal values underlying the Chinese self-image of their civilisation. The political influence of such ideas is magnified by the practice of Chinese ancestor worship (Lakos, 2010: 57-80) because Duke Wen has been 'canonised' as China's sage

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<sup>36</sup> Author's Translation.

<sup>37</sup> I do not intend to imply that only the Han Chinese people would die for reputation – it happens in the West as well. For example, the most common critique of the *homo economicus* theory is that 'people not only leave tips in restaurants that they anticipate never again visiting, they sacrifice and even die for beliefs that do not materially enrich them, or for that matters their kin and descendants' (Ross et al., 2010: 33). Even though I apply Eric Posner's opinion of *homo economicus* theory, my view of choosing death for reputation coheres Benjamin Franklin's thought – 'the motive shifted to self-interest, for business virtues were "natural means of acquiring wealth, honour, and reputation"' (Frey, 2009: 27). For Adam Smith (Olsthoorn, 2015: 61-62), reputation was considered as a kind of self-interest, so I hold that Duke Wen Tian-Xiang's choice represented his self-interest because reputation mattered to him.

through the cultural construction of memory and the practice of remembering (cultural relevance).<sup>38</sup> His decision may enlighten modern political scientists to rethink the scope of their political interests, or at least to subsume their choices into one of the available political options in the Chinese world.<sup>39</sup>

## **1.6 THE PURSUIT OF JUDICIAL SELF-INTEREST**

The pursuit of judicial self-interest has become a common theme in judicial behaviour literature, and most scholars assume that self-interest can have a considerable impact on judicial decision-making. An initial and fundamental assumption of this thesis is therefore that the construction of models of Taiwan's Judicial Yuan's behaviour begins by embracing this habitual reiteration of the pursuit of judicial self-interest. As a next step, the concept of judicial self-interest is then explored in the context of cultural differences, Taiwan's judiciary's specific professional ethics, judicial career paths and judicial education.

Various scholars have conceptualised judicial self-interest in somewhat elusive ways that cover a wide variety of meanings, so the concept could almost be said to encompass any motivation of judges at any point in time in the judicial decision-making process (Baum, 2006: 11). Self-interest has been said to refer to a general concern for public policy (Smith, 1995: 4), material benefits for judges or their courts (Zhang, 2009: 143),

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<sup>38</sup> China's fundamental philosophy, as constructed by Confucius dictates that 'personal individual perfection is situated within the notion of "Chun-tzu" (gentlemen), whereas interpersonal communal perfection is manifested through the notion of "Shen-jen" (sage). The philosophy of life is the focus of Confucianism' (Woo, 1997: 85-86). In other words, we are dealing with a social context in which concrete cultural practices structure and reinforce distinct value orientations.

<sup>39</sup> I would apply Eric Posner's shame-and-guilt argument (the norm-based model), holding that Duke Wen Tian-Xiang was maximising his reputation (*homo economicus* theory) because he felt ashamed or guilty (Stout, 2011: 36-37) if he were to choose to ignore the Confucian norm.

or simply reputation<sup>40</sup> (Garoupa and Ginsburg, 2009: 452-454; Posner, 1993: 15). No matter what kind of judicial self-interest is prioritised by judges, they are still pursuing the maximisation of their judicial self-interest (Posner, 1993: 1-41).

The idea of judicial self-interest can also be read in accordance with the classical constitutional doctrine of the separation of powers. The purpose of the doctrine is to restrain ‘a natural human tendency toward expansion of personal power’ (Carper and McKinsey, 2012: 47). There is no reason, especially not from the perspective of legal realism, to exclude judges from such natural human tendencies (Bond and Smith, 2008: 526).

One of the best examples of the complexity of judicial motivation was provided by the US Supreme Court in 1989, when Chief Justice Rehnquist held a news conference about salary increases for Supreme Court Justices (Smith, 1995: 45-46). Chief Justice Rehnquist’s pursuit of judicial self-interest seems straightforward here, because a call for salary increases is exactly the sort of material benefit *homo economicus* pursues as an individual. But at the same time we can also conceptualise the Chief Justice’s actions as a more selfless pursuit of institutional self-interest, with adequate judicial salaries as a cornerstone of the judicial independence of the court as a whole.<sup>41</sup> Whilst money is

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<sup>40</sup> I refer to Richard Posner’s *homo economicus* theory (Posner, 1993: 1-41). He begins with non-profit enterprise theory, assuming that judges shall not work as hard as lawyers because courts are non-profit institutions (ibid: 7-13); however, judges work as hard as lawyers in reality. Posner then lists some elements of judicial utility function (ibid: 13-15), holding that judges ‘must be deriving utility from the work of being a judge, and not just from the status of being a judge ... their utility function must in short contain something besides money income (from their judicial salary) and leisure’ (ibid: 13). One of the elements that concerns judges, according to Posner, is reputation (ibid: 15).

<sup>41</sup> Legal academics worldwide often distinguish individual self-interest from institutional self-interest (Connelly, 2010: 147). However, the pursuit of institutional self-interest seems to lie at the core of Taiwan’s Judicial Yuan. I have no intention of saying that Taiwan’s Justices do not pursue individual self-interest, but Chinese culture determines Chinese approaches to pursuing self-interest, in that ‘the correct way to pursue self-interest is “subjectively for oneself, but objectively for all others”’ (Yan, 2011: 42). In other words, it is quite difficult to distinguish the pursuit of individual self-interest from the pursuit of institutional self-interest in this thesis – even when the Justices intend to pursue individual

the key factor here, the non-material benefits that judges are pursuing are substantially more important throughout this thesis. Non-material interests within the Taiwanese judiciary are not easily visible, although they do exist, particularly in relation to judicial careers (Posner, 1993: 1-41).

Taiwan's Constitution of 1947 acknowledges the presence of judicial self-interest by safeguarding the interests of judicial decision-makers and judicial institutions through Article 81:

Judges shall hold office for life. No judge shall be removed from office unless he has been found guilty of a criminal offense or subjected to disciplinary measure, or declared to be under interdiction. No judge shall, except in accordance with law, be suspended or transferred or have his salary reduced.<sup>42</sup>

Constitutional law scholars agree that Article 81 is crucial for the development and maintenance of judicial independence in Taiwan (Chang, 2006: 301-302; Chen, 2005b: 779-782; Li, 2008: 61-83; Tung, 2005: 476-477). However, none of these scholars have ever conceptualised Article 81 within a framework of 'self-interest'.<sup>43</sup> Although Article 81 is at first sight a straightforward, standard constitutional safeguard for judicial independence, it is also a window into the judicial mind, informing the conceptualisation of a judge's or court's self-interest through the study of actual practice. Right and interest are indeed two sides of the same coin, and the ways judges

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self-interest, their conduct may be interpreted as the pursuit of institutional self-interest.

<sup>42</sup> Constitution of R.O.C. § 81 (1947).

<sup>43</sup> Nigel N.T. Li argues that Article 81 is an institutional safeguard of judicial independence (Li, 2008: 82-83), and Chen Tsi-Yang holds that the Article embodies judges' constitutional right against political interference (Chen, 2005b: 781).



make use of their rights can be understood from the perspective of self-interest as well.

Historical evidence deriving from Article 81 case law thus substantiates assumptions of self-interest pursued by Taiwan's judiciary in both material and non-material terms. For instance, the first ever salary increase<sup>44</sup> for all levels of judges was initiated and promoted by Lin Yang-Kang, the then Head of Judiciary<sup>45</sup> (1987-1994), and was considered one of his most important judicial reform policies (Interview with Lin on 10-MAR-2004). It is a common global assumption that 'the personal independence of judges emphasizes a very important aspect of judicial independence, namely that the judges' personal income should be determined in a way which removes any possibility of influence over judicial decision-making' (King, 1985: 410). However, in Taiwan it was the Head of Judiciary who pursued such interests on behalf of the judiciary. No matter how justified Lin's salary increase policy was, it is evident that Taiwan's judiciary shows a tendency to pursue judicial self-interest.

[I think that our] judges' salaries must be high enough not only to avoid corruption but also to maintain reputation. It is said that 'only rich lords sit on good chairs' and [as long as] our judges behave like rich lords, sitting on good chairs with reputation, [they] would find no motivations

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<sup>44</sup> Lin Yang-Kang doubled the salary for all levels of judges via a salary increase bill in the Legislative Yuan (Interview with Lin on 10-MAR-2004), explaining that judges cannot be treated as normal public functionaries. Before Lin Yang-Kang's bill, judges in Taiwan were paid as much as normal public functionaries, and Lin successfully distanced judicial salaries from those of other public functionaries.

<sup>45</sup> The Head of Judiciary is an unusual terminology in English, but this position can only be translated in this way because there is no comparative position in either America or Britain. According to Article 51 of the Additional Articles of the Constitution 1997, the Chief Justice was not appointed Head of the Judiciary until 2003 and before 2003 the Head of Judiciary was neither a Justice nor a judge, and had no adjudicating power whatsoever. Lin Yang-Kang was even not a legal professional. The Head of Judiciary took the role of head of judicial administration, and was appointed by the President before 2003. This position now belongs to the Chief Justice (Full title: Chief Justice and the Head of Judiciary of the Republic of China).

and will refrain from corruption.<sup>46</sup> (Interview with Lin on 10-MAR-2004)

Furthermore, the machinations of judicial power often resemble self-interest, particularly when strengthening the court and its reputation in institutional terms. The Judicial Yuan, from a global comparative perspective, has ripened into a paragon of judicial power in the realm of maximising non-material forms of self-interest. It successfully seized the ultimate constitutional power in 2000 – the power to strike down constitutional amendments it considered unconstitutional<sup>47</sup> (Kommers, 1997: 48). This strengthened the political position of the Judicial Yuan as the state’s ultimate policy maker, namely ‘the guardian of the constitution’ (Sze and Tsai, 2007: 699). In this remarkable case the Justices widely elaborated the theory being the guardian of the constitution, citing Karl Larenz’s *Methodenlehre der Rechtswissenschaft* and Emilio Betti’s *Allgemeine Auslegungslehre als Methodik der Geisteswissenschaften*, claiming that:

The primary function of interpreting the law is to resolve overlap or conflict of rules, including doubts resulting from defects or gaps created by contradictory rules enacted at different times and this should also be the duty for the institution charged with the power of constitutional interpretation.<sup>48</sup>

In addition to the Judicial Yuan’s claim of ‘duty’, the Justices further cite the German

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<sup>46</sup> Author’s Translation.

<sup>47</sup> *Judicial Yuan Interpretation No.499* [2000].

<sup>48</sup> *Judicial Yuan Interpretation No.499 Reasoning* [2000].

Federal Constitutional Court decision of December 15, 1970 (BVerfGE 30, 1ff.) and hold accordingly that ‘cases have shown that their constitutional courts not only take on procedural matters, but also conduct reviews of substantive matters’.<sup>49</sup> In other words, even the Justices themselves were aware that the ROC Constitution did not clearly give them the power to strike down unconstitutional constitutional amendments, and they realised that they could expand judicial power through the interpretation of the guardian of the constitution that was provided by the Constitution itself.

It is possible that judges simply make sincere decisions (Baum, 1997: 98-100). For instance, a judge decides according to his cultural sense of justice (system justification theory) without any conscious thoughts of self-interest. However, this thesis – like all other studies on apex court decision-making – gives more weight to the external perspective of the scientific observer. If an external observer’s analysis shows that a judicial decision was made in relation to the actions of a third party,<sup>50</sup> then such a decision will be labelled as strategic. Whether the judge was cunning in his strategic approach, partially self-aware of the strategic dimension or genuinely convinced that the decision was purely a matter of legal interpretation, it makes no difference to the external observer. As a starting point, all the scientific observer needs to identify a strategic pattern – a pattern that can become overwhelming evidence of strategic judicial decision-making. This forms the basis of judicial activism in most cases, and judicial deference in death penalty case<sup>51</sup> and the ‘Is Taiwan part of China?’ case.<sup>52</sup> Such patterns of assertion and deference offer us strong insights through the application

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<sup>49</sup> Id.

<sup>50</sup> *E.g.*, Would it be implemented? Would there be retaliation? Would the public celebrate the court as wise or condemn it as out of touch? How would it appear to the formation of a coalition on the bench, who will vote for it?

<sup>51</sup> *Judicial Yuan Interpretation No.476* [1999].

<sup>52</sup> *Judicial Yuan Interpretation No.328* [1993].

of the strategic model. In addition, we can ask the Justices themselves (interviews can provide evidence of how judicial decision-making works) and we can read their musings in the archive of Judicial Yuan in Taiwan.

There is an arsenal of different conceptual tools for analysing judicial decision-making. Decisions can represent self-interest, plain and simple, either in terms of prestige or gaining the ultimate power in the separation of powers setting. Justices may perceive the role of the court as naturally avaricious, not in the lust for power of an individual judge but in the way they define their constitutional duty, checking other branches of government. However, unless the decision brings no interest whatsoever to the Justices, or causes political damage to the Judicial Yuan, it cannot be considered by this thesis to be a truly sincere decision because as soon as Justices start looking at the future behaviour of other actors, their motives can be seen to be strategic and their real preferences are then modified by strategic considerations. In the absence of viable alternatives, we have to think of judicial decision-making in this way. Of course, there is a distinction between the judge's opinions and his belief in his motivations (is he selfless, law-bound or politically motivated). But we are not him; we are not privy to his inner thoughts. All we can do is interpret, search for meaning, try to discover patterns, so for us the strategic paradigm creates the most convincing narrative.

## **1.7 THE COURT, DEMOCRATIC LEGITIMACY AND PUBLIC OPINION**

Modern democracies have historically turned the doctrine of separation of powers into a cornerstone of their government systems (Bagehot, 1867: 155-177; Madison, 1788: 317-322; Schmitt, 1928: 186-187). Whenever a new constitution is written or an existing one revised, particularly if international and foreign advisors are involved,

separation of powers arrangements will find a prominent place in the document. Undergraduate law students and the legal profession have internalised the necessity of the separation of powers into the realm of the ‘unquestioned’ (Staab, 2006: 83), as something that is a *fait accompli*, beyond the need for discussion; and for Taiwan, academics seem enmeshed in discourses on separation of powers too (Wu, 2004: 51-54).

For well over a hundred years we rigorous critiques have remained perplexed by the contradictory answers, in which each institution is meant to check and balance the other institutions – yet a rule for who should have the last word is conspicuously absent. This thesis is not concerned with the normative and theoretical dimensions of the separation of powers scholarship; instead it treats the separation of powers as a practice. A judicial decision can be assertive or deferential (we can further distinguish between weak or strong levels of assertion or deference). Similarly, whether a legislature overrides a judicial decision or defers to a court is a question of practice, for which we can find specific historical examples. The same applies to the degree of implementation of judicial decisions by the executive; does an executive agency take strong measures to implement an order? Or does it refuse to implement it? Does it fail to implement the order by stealth? From *Marbury v. Madison* (1803) to *Lochner v. New York* (1905) and the New Deal crisis, from *Golaknath v. State of Punjab* (1967) in India to the Crucifix Decision (1995) of the German Constitutional Court we find examples of intra-branch conflict, although we also find intra-branch cooperation (Dahl, 1957: 279-295; Whittington, 2005: 583-596).

The separation of powers doctrine sets in motion the practice a series of associated political machinations that help us identify various branches of government and their

interests; however, it does not help us to predict or even explain which branch will win (or have the last word) or when. What is more, the separation of powers doctrine does not even give us a normative framework which could allow us to decide which branch should win. All we have are contradictory statements: parliament decides with democratic legitimacy and judges must overrule parliament to protect minorities or minority opinion. When parliament makes a bad decision or does something that is not approved (tyranny of majoritarianism) provoking a court to intervene, some scholars struggle with Bickel's 'countermajoritarian difficulty' (Bickel, 1962: 9-22), although these debates are usually destined to be inconclusive. As far as this thesis is concerned, there is just a question of fact: who wins? All we need to do is observe trends and discover who has the last word most often. If the Justices usually win, that represents judicial power. This thesis will not stand in judgement of whether the outcome is a good or a just one.

The power of the Judicial Yuan is puzzling to those who think about institutional legitimacy only in terms of elections. How can a court be powerful enough to effectively check and balance the elected branches of government without democratic legitimacy? There are fine theoretical distinctions that describe the legitimacy that derives from the idea of 'representation'. Elections, or rather electoralism, is linked to legitimacy, but can also lead to the illegitimacy of brute majoritarianism. Constitutional democracy is designed to solve the problem of a tyrannical majority by setting out a clear and specific role for judicial review, but it leaves us with a paradoxical relationship between the rule of law and democracy.<sup>53</sup> Institutions can also derive legitimacy from culture, tradition,

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<sup>53</sup> E.g., Habermas: 'The procedural legitimacy of the outcome of any given discourse depends on the legitimacy of the rules according to which that type of discourse has been specified and established from temporal, social, and material points of view. If procedural legitimacy is the standard, then the outcome of political elections, the decision of parliaments, or the content of court decisions is in principle subject to the suspicion that it came about in the wrong way, according to deficient rules, and

history or pure technocratic brilliance (such as Singapore's authoritarian model) or jurisprudential strength and the power of argument in a deliberative democracy:

[W]hen a convinced democrat with this mentality, in the role of a highly activist Supreme Court judge, has no qualms in making extensive use of the dubious instrument of judicial oversight, then perhaps the jurisprudence he has shaped exposes the secret of how one can combine the principle of popular sovereignty with constitutionalism. (Habermas, 2001: 769)

We can see examples of the practice of judicial review and patterns of assertion after 1990: democracy in Taiwan began<sup>54</sup> with the injunctive dissolution of the authoritarian National Assembly via a constitutional court order.<sup>55</sup> Hence, it was the judiciary rather than the legislature that in many ways became the most crucial trigger for Taiwan's democratic transition (Ginsburg, 2003: 106-157). Although there is no clear evidence<sup>56</sup> that shows the Justices were inspired<sup>57</sup> by a series of international political events (such

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in a deficient institutional framework' (Habermas, 2001: 774).

<sup>54</sup> It is commonly believed that Taiwan's democracy began in 1990 (Vanhanen, 1997: 148). The reason I differentiate 'democracy' from 'politics' is because Taiwan has held elections at local government levels ever since 1945. *See generally* Chapter 6.

<sup>55</sup> *Judicial Yuan Interpretation No.261* [1990].

<sup>56</sup> Justice Herbert H.P. Ma: 'I was one of the Justices who supported the decision of the *Judicial Yuan Interpretation No.261* [1990], and I can tell you why I supported it ... at that time the public opinion in our country was already changed, and the society could no longer accept a state of emergency, so I think the law should be modified. We the Justices had already noticed the changing political atmosphere in which [our] nationals wanted a constitutional reform, whereas our people's desire was just. Therefore, the fifth-term Justices had a common consensus that we should push the country's constitutional and political system towards this necessary reform' (Interview with Ma on 13-JUL-2013). (Author's Translation)

<sup>57</sup> Taiwan's democratic transition in 1990 was politically extremely complex, and it is therefore difficult to estimate how influential these international events were in Taiwan's constitutional politics. Taking German reunification as an example, it is hard to see how influential this event was on Taiwan, because Taiwan attempted to break through the constitutional barrier which dictated that the constitutional democracy must consist of the whole of China. Taiwan wanted the ROC's constitutional democracy to consist only of the Taiwanese people; this was Taiwan's so-called democratisation. *See generally* Chapter 6.

as the 1989 Tiananmen Massacre and German Reunification in 1990), the Justices had a truly historic opportunity if they wanted to do something (Chapter 6), and in practice they stood with their people in pursuit of democracy at this special<sup>58</sup> constitutional moment. From such an alliance, the judiciary of Taiwan was rewarded with the judicial interest of maintaining independence (Wang, 2010b: 141-143) and of expanding power (Li, 2012: 332-352).

Some constitutional legal scholars such as Alexander Bickel voice doubts about the judiciary's capacity to obtain democratic legitimacy at any level. Where does the legitimacy of unelected judges come from, and is it even possible to conceptualise the legitimacy of unelected judges as democratic legitimacy? As long as our norms are narrowed to the concept of electoral democracy<sup>59</sup> (MacKuen and Rabinowitz, 2003: 1-12), we cannot consider democratic representation without the electoral process as a possible answer.<sup>60</sup> For Taiwanese jurists and lawyers – and even for politicians – the starting point of considering the legitimacy of unelected institutions is not so much the question of an electoral process. Instead they look first towards Mencius.

Mencius devised a theoretical basis for the democratic legitimacy of unelected judges.

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<sup>58</sup> As mentioned previously, this thesis follows the strategic model, holding that the Justices chose the year 1990 as their starting point of their vocally strategic politicisation because it represented a unique point at which third wave democracy (Huntington, 1991: 31-108) emerged internationally. Though the argument of this thesis is not to prove how influential these international events were over the Justices. Their decision in *Judicial Yuan Interpretation No. 261* [1990] answers to the strategic paradigm which the Chinese traditionally call 'the opportunity given by the Heaven'.

<sup>59</sup> Of course, this thesis does not intend to challenge electoral democracy. The intention here is to point out that it is possible for an unelected administrator or judge to obtain democratic legitimacy if his/her decision answers to public interests, and he may be as powerful as elected officials in politics by doing so. This thesis considers that elections provide the fundamental precepts of democracy and does not support the Chinese definition of democracy, i.e. democracy with Chinese characteristics.

<sup>60</sup> Hanna Pitkin defines representation as 'making present again' (Pitkin, 1967: 209) and according to her, if there is another mechanism of representation, why should an institution necessarily be non-representative without elections? The distinction between the elected and the unelected is not equal to the distinction between representative and non-representative.



With Confucian intuition, Mencius argued that office holders – including judges – are obliged to serve the needs of the people (Birdwhistell, 2007: 89-110). Moreover, if a person who is in power does not rule the country justly, he is no longer a qualified ruler and deserves to be overthrown or even executed<sup>61</sup> (Bloom, 2009: 156-168). Mencius' political thought illustrates the importance of the interrelation between judges and the public because it refers to the legitimacy of decision makers in the Chinese world:

What our people see is what Heaven sees, [and] what our people hear is what Heaven hears.<sup>62</sup> – Mencius (372-289BCE)

Mencius [...] agrees that heaven is the ultimate source of political power and its legitimacy. [...] Heaven owns sovereignty. [...] In its rightful exercise of sovereignty, heaven must be shown in one form of action, the gravitation of the people's hearts, which is a sign of the decision taken by heaven to transfer sovereignty, supreme political power, to another [...] the will of the people is but one form of sign of the will of heaven. (Jiang, 2013: 184)

*Salus populi suprema lex esto.* – Cicero<sup>63</sup> (106-43BCE)

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<sup>61</sup> Birdwhistell (2007: 89-110) symbolises the traditional Chinese relationship between the ruler and the ruled using the parent-child model, holding that 'the ruler's behaviour as father and mother establishes new ideas both about the relationship between the ruler and the ruled and of the ruler and the ruled themselves' (ibid: 89). This thesis does not agree entirely with the parent-child model because it cannot explain why Mencius allowed the revolution against the father-king. However, Mencius established a behavioural norm for the ruler and the ruled.

<sup>62</sup> Author's Translation.

<sup>63</sup> In my opinion, Mencius' political thought establishes a decision-making norm for rulers based on the *salus populi suprema lex esto* doctrine. See generally Shapiro's *Courts: A Comparative and Political Analysis*, in which he narrates the duties of the imperial Chinese district magistrate when exercising judicial power (Shapiro, 1981: 177-179).

Li explains the mechanism of Mencius' political thought further through a legal philosophical approach. He argues that in Confucianism, the Chinese concept of democracy consists only of democracy *of* the people and *for* the people, but not *by* the people through elections (Li, 2012: 50-52); therefore, the Confucian school particularly highlights the need for other forms of interaction between the ruler and the ruled (ibid: 42-45) in order to maintain good governance in ancient China, in turn providing legitimacy. Contemporary scholars are duty-bound to question such political designs played out in real life over 2400 years ago, but Mencius' writings, in terms of both historical imagination and the more abstract realms of ideal-types, imposes a cultural and moral burden upon judges in Taiwan that is bound to self-reinforce judicial behaviour.

Given Storey's suggestion that Chinese political philosophy ranks legitimacy as good governance (Storey, 2006: 22-23), it is – theoretically at least – irrelevant or insignificant whether an office holder has been elected, appointed or even determined by lottery<sup>64</sup> (Duxbury, 1999: 27). The mechanism of accountability – whether the office holder is elected or unelected – can therefore also be considered irrelevant, and legitimacy can derive from the just use of power or mere technocratic acumen and outcome-based legitimacy. To use an agricultural metaphor, if a large harvest is obtained through skilful administration of irrigation systems, what does it matter whether the administrators were elected or selected, trained, appointed and then

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<sup>64</sup> For example, in ancient Athens, the office holders were picked by lottery not by election (Duxbury, 1999: 27), so how can we consider this as a democratic process? In other words, there are wide differences in the way we conceptualise both democracy and representation – what we have today in the USA and the UK, an ancient Greek philosopher would have considered as mob rule. Similarly, until the 19th century, many scholars considered representative democracy not as democracy at all (Mezey, 2008: 2) – because only direct forms of democracy such as referendums were considered truly democratic. The question here is how can we call ancient Athens a democracy on the one hand, whilst blaming the Justices for anti-democracy when they made decisions in accordance with public opinion?

supervised by the emperor? To offer a contemporary example, in contrast to many states in the USA, where judges are elected, or the election of constitutional court judges in Bolivia (Barrera, 2012: 380), the notion of elected judges is completely alien to the political system of Germany, where judges are career judges, and are thus constantly being trained, examined, trained again, selected and promoted on merit, rather than arbitrarily elected by popular vote. However, the German system is not only one of the most reputable legal system in the world, but also ‘thought to be a desirable object for transplantation to Taiwan’ (Williams, 2005: 382). Germany’s unquestioned trust and the legitimacy of its judiciary (Slagter, 2006: 1) allows us to think of indirect democracy and other mechanisms of considering the preferences of a population (Vanberg, 2005: 121) as a common notion of governance.

Traditional Chinese political thought thus had memes (Dawkins, 1989: 245-260) that helps us understand both judicial behaviour (i.e., Max Weber’s moral attitude towards law, dogmatic jurisprudence and sociological understanding in terms of ideals; Kronman, 1983: 7-14) and public support for the judiciary in Taiwan. Whenever the Judicial Yuan manages to decide in line with the preferences of the majority (often overwhelming majorities, such as when it comes to perceptions of power-abuse, corruption and incompetence that are so often associated with the legislature and executive), the indirect democratic legitimacy of the court grows. The result of this is that Taiwan’s citizens learn to trust and respect the Judicial Yuan more than – and often at the expense of – other branches of government. Over time, public support for the Court – as an institution as well as in specific cases – has thus grown so strong that the Judicial Yuan in crucial constitutional moments wins any separation of powers games because of its ability to build a strategic alliance with the public. The actual practice of constitutional judicial review thus constitutes the court as a majoritarian institution in

most of the time.

Mencius' writing thus offers powerful conceptual tools for the study of judicial practice in Taiwan, and the citizens of modern Taiwan display high levels of trust in electoral democracy (Fell, 2012: 29-40). At the same time, with Mencius and Confucius taking the place of Socrates and Plato in Western democratic discourses, Chinese culture can also instil a strong predisposition towards trust and support for unelected judges, associated with the possibility for transformative justice through 'right' decisions that may even become legendary.<sup>65</sup> Outcome-based forms of legitimacy – as opposed to procedural legitimacy through elections, see the agricultural metaphor outlined above – can thus matter more in the Chinese worldview, and someone who exercises his power justly, prudently and wisely can wield enormous power over those who have only been legitimated through elections.

## **1.8 CONSTITUTIONAL JUDICIAL BEHAVIOUR AND PUBLIC OPINION**

For almost a hundred years, American jurists have shed fresh light on judicial decision-making, inspired by the rise of legal realism<sup>66</sup> and the polarisation of debates between legal formalist schools of thought (Tamanaha, 2010: 11-63) and legal realists (ibid: 65-108). As Tamanaha's recent analysis illustrates, these debates often involve a good deal

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<sup>65</sup> The best example is provided by Lord Bao Zheng of the Imperial (Chinese) Song Dynasty (960-1279). He was a legendary judge and was honoured (and titled) 'the Blue Sky' (meaning he could make everything clear, like a cloudless blue sky). Lord Bao was certainly not elected by the people, but he remains a symbol of justice and the anti-prerogative within the Chinese civilisation. In Taiwan, people still honour their respectful judges as 'the Blue Sky' even nowadays.

<sup>66</sup> There is no doubt that judicial appointment matters not only in the USA (Krehbiel, 2007: 231-240) but also in Taiwan. However, judicial appointment was irrelevant in Taiwan in the 1990s for two reasons: Firstly, the Justices who dismissed the authoritarian congress were all appointed by that same authoritarian regime, and Taiwan's first party alternation occurred in 20 May 2000. Secondly, the political party that organised the authoritarian regime, the Nationalist Party, lost its majority in the ROC congress until 2016. The Nationalist Party appointed the Justices who voted against them in the 1990s, making Taiwan's case even more valuable.

of straw-man argument and caricature, in which each side portrays the other as naive models. To put it positively, we encounter different ideal-types of judging, in the Weberian sense that ideal-types (Kronman, 1983: 7-14) are useful conceptualisations even if they are not matched in reality. Legal formalism treats law as ‘a closed and gapless system of rules that can be applied logically, without the need to take into account any policy or moral considerations’ (Ratnapala, 2009: 94). In terms of this thesis, such mechanical jurisprudence cannot even begin to conceptualise public opinion as a factor in judicial decision-making, because legal interpretation is imagined along mathematical lines in terms of outcome stability as well as in terms of a right-wrong binary. In contrast, legal realists would approach the Judicial Yuan from the perspective of Hughes: ‘The Constitution is what the judges say it is’.<sup>67</sup> This often gives room for law to be ‘made through the medium of the courts’ (Tonapi, 2010: 34) to the extent<sup>68</sup> that ‘a judicial decision might be determined by what the judge had for breakfast’ (a well-known quote from Judge Jerome New Frank) (Piedrahíta, 2012: 67). For a legal realist, it would be just as natural to accept the idea that judges can be

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<sup>67</sup> See also Cardozo: ‘There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. ... In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own’ (Cardozo, 1921: 12-13).

<sup>68</sup> Some very impressive research was reported by Israeli academics: ‘A paper in the Proceedings of the National Academy of Sciences describes how Shai Danziger of Ben-Gurion University of the Negev and his colleagues followed eight Israeli judges for ten months as they ruled on over 1,000 applications made by prisoners to parole boards. The plaintiffs were asking either to be allowed out on parole or to have the conditions of their incarceration changed. The team found that, at the start of the day, the judges granted around two-thirds of the applications before them. As the hours passed, that number fell sharply ... eventually reaching zero. But clemency returned after each of two daily breaks, during which the judges retired for food. The approval rate shot back up to near its original value, before falling again as the day wore on’ (The Economist: The Economist 14 April 2011).

influenced by public opinion<sup>69</sup> as it would by what they had for breakfast.<sup>70</sup>

Whilst it is important for our analysis to have ideal types, we do not need to embrace the idea of a single and unified theory of judges and courts – let us be realistic: why can't a judge who normally embraces legal realism behave like a formalist in a specific case?<sup>71</sup> There are many judicial roles, and our expectations of what a judge should do vary, thereby shaping variation in the theories of judging. But if we consider sociological understandings and the expectations of the Taiwanese version of 'the man on the Clapham omnibus' – or in the language of political science, the values of the average citizen in Taiwan – we are bound to find strong opposition to the idea of mechanical jurisprudence. Traditional Chinese legal-cultural values have strongly favoured substantive justice and subjective dispute resolution over procedural justice and formalism (Woo and Gallagher, 2011: 13); there is no expectation of a guarantee that the law is absolutely just, and there is an intuitive understanding that each case will differ. This matters in various ways: if a Justice pays attention to the expectations of what makes a good judge in the eyes of the public, he will feel more confident about openly following the role model of legal realism. While Justice Scalia and other conservative judges in the USA expend a great deal of effort and resources on

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<sup>69</sup> Taking Justice Cardozo as an example, it is obvious that he acknowledged that a judicial decision must be determined not only in accordance with law, or he would not have said: 'If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself' (Cardozo, 1921: 113). Of course, Cardozo did not construct the judicial audience theory (Baum, 2006: 1-175) – or he would continue to address the idea of where the legislator normally gets the political knowledge from.

<sup>70</sup> Jurists were also constantly prodded by the emerging academic discipline of political science (the attitudinal model for constitutional judicial review) to the extent that jurisprudential skills of judges and quality/plausibility of legal interpretations completely disappear from the analytical framework (Maveety, 2003: 1-51). However, the judges themselves – whenever they encountered these arguments at conferences or in scholarly conversations – always insisted that the law and interpretation matters.

<sup>71</sup> Epstein and Knight admitted that it was wrong to assume that judges only 'seek to etch their political values into law' (Epstein and Knight, 2013: 11) because there is more than one policy goal for judicial motivation in reality (ibid: 11-31). Epstein and Knight caused this thesis to reconsider strategic models and legal realism again – why cannot judges embrace legal formalism strategically?

convincing their audiences that they are only following the law when interpretation through originalism is not just theoretically possible but also their actual practice, the Judicial Yuan distances itself from such debates. A Taiwanese Justice trying to maximise prestige does not have to pretend to be a formalist – neither the public in general, the legal profession, academic law departments nor other elite constituencies outside the legal realm would expect that a Justice could or should make decisions according to mechanical syllogism.<sup>72</sup> This is not to say that any of these audiences would embrace statements that cases might be determined by ‘what a judge had for breakfast’ or that they do not intuitively understand the purpose of court procedures to encourage specific types of decision-making (reasoned, transparent, deliberative). However, Taiwan’s public preference for substantive justice (ibid) eventually provided the Justices with the ‘necessary evil’, *inter alia*, to override ‘unreasonable’<sup>73</sup> acts of the legislature as well as administrative decisions. In Taiwan, the ideal type of court is one that follows substantive justice, and underlines that the public is comfortable with the idea of general principles and broad normative orientations and has had no bad experiences<sup>74</sup> with this powerful Judicial Yuan. There is neither a culture of judicial restraint nor a century long celebration of participation through elections, as there is in

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<sup>72</sup> The best example is could we expect a judiciary to dismiss an authoritarian regime by claiming the present constitutional amendment is mistimed? But this is exactly what happened in Taiwan. If the Judicial Yuan was not expected to decide like a syllogism machine, how could such a decision be enforced in good faith? *See generally Judicial Yuan Interpretation No.261* [1990].

<sup>73</sup> The so-called ‘unreasonable’ law is widely open to debate, but such a legal philosophical debate is beyond the remit of this thesis. The public in Taiwan determines reasonable law via a rather unsophisticated approach based on Weber’s moral attitude towards law (Kronman, 1983: 7-14). Take capital punishment as an example: it is not the intention of this thesis to discuss whether capital punishment is just, but there is no doubt that the majority vote for an eye-for-an-eye justice in Taiwan. The majority people of Taiwan would appreciate the Justices if they were to strike down any Act of the Legislative Yuan that abolishes capital punishment. This is a problematic area, but such a problem encapsulates the importance of this thesis – that the Justices consider themselves as substantive providers of justice, and that so-called substantive justice is in fact defined by public preference. But if this is the case, why not just be realistic and accept that the Justices strategically stand in line with public opinion?

<sup>74</sup> In the 1990s, from *Judicial Yuan Interpretation No.250* [1990] to *Judicial Yuan Interpretation No.498* [1999], no case is found that shows that the Justices disregarded public opinion. All we can see is that the Justices applied political question doctrine or avoided provoking public opinion. *See also* Chapter 9.

the UK. Values and experience gave the Judicial Yuan a strong impetus; in the 1990s the ROC Government was still controlled by nationalists who operated the authoritarian regime in pre-democracy, and the ROC congress was notorious for its legislative violence (Ig, Nobel Peace Prize, 1995) as well as incompetence, leaving the Taiwanese people with no authority they could in reality turn to or count on.

This thesis has no intention of claiming that the Taiwanese people unconditionally favoured the Judicial Yuan in the 1990s; In contrast, the core of the thesis is to prove that the Justices never chose to defy public opinion, explaining why they were able to successfully challenge the other two branches of government.<sup>75</sup> As Lippmann argued that:

Representative government, either in what is ordinarily called politics, or in industry, cannot be worked successfully, no matter what the basis of election, unless there is an independent, expert organization for making the unseen facts intelligible to those who have to make the decisions. (Lippmann, 1922: 31)

We therefore need to accept that a court with the support of public opinion may step in and challenge elected branches of government successfully because the court is

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<sup>75</sup> Ordinarily a public opinion survey of judicial reliability is deemed an index, but here such a survey would be irrelevant because the Taiwanese people do not trust any institution unless they can see ‘substantive justice’ being offered. In other words, no governmental institution is considered reliable in Taiwan. Take public opinion surveys conducted by the Judicial Yuan in 2000 as an example: only 38.3% of the public considered the judiciary reliable (ROC Judicial Yuan, 2000a) but 84.8% of lawyers answered that the courts’ reliability is acceptable (ROC Judicial Yuan, 2000b). In contrast to the reliability of the Government or the congress, the judiciary is a lot better – a public opinion survey of corruption conducted by the Ministry of Justice in 2003 shows that judges scored 5.42, but elected government functionaries scored 4.79, and congressmen and congresswomen scored only 3.97 (ROC Ministry of Justice, 2012).



following Pitkin's definition of representation as 'making present again' (Pitkin, 1967: 209). In other words, whilst the Taiwanese people consider the representativeness of their representative democracy, they would expect the Judicial Yuan to 'make it present again' (ibid) in politics.

In the 1990s the Judicial Yuan highlighted the merit of strategic decision-making with attention to public opinion. In the name of *salus populi suprema lex esto*, they did not even have to pretend to be formal. As long as they stood in line with public opinion, they would have more room to manoeuvre towards the expansion of judicial power. History shows that the Judicial Yuan was originally no different than a privy council offering regime support (Dahl, 1957: 279-295) during the period of dictatorship (Li, 2012: 295-296). However, it appeared to fall in line with the preferences of the mass public opinion by judging strategically, moving very carefully, step by step,<sup>76</sup> testing the patience of the authoritarian government as it went<sup>77</sup> (Ginsburg, 2003: 106-157). Subsequently, the legendary *Judicial Yuan Interpretation No.261* [1990] constructed and illustrated the logic of accumulation of legitimacy against the other two branches of government through 'strategically correct'<sup>78</sup> decisions (Baum, 2006: 5-9). When such separation-of-powers-games increase in frequency, and as the context shifts from authoritarianism to democratisation in the 1990s, the 'equilibria', or optimal positions

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<sup>76</sup> E.g., *Judicial Yuan Interpretation No.86* [1960]. It was the Justices' first attempt to test the patience of the authoritarian government, but this attempt was unsuccessful because public opinion at the time was 'not interested in' the case (Interview with Ma on 19-JUL-2013): The Justices ordered the Ministry of Justice to surrender the supervision power of all the high courts and district courts to the Judicial Yuan on 15 August 1960, but the Ministry of Justice conveyed the power on 1 July 1980 (Wang, 2000: 240-241) under the name of 'complexity' (Tung, 2005: 441-442). In this, the Justices learned a useful lesson: the authoritarian government would not choose to strike down any judicial decision roughly to avoid stirring up public anger.

<sup>77</sup> Epstein, Knight and Shvetsova define this as 'tolerance interval' (Epstein et al., 2001: 128) and hold that 'judicial decisions must remain within the tolerance intervals of other actors' even in democracies (Vanberg, 2015: 179).

<sup>78</sup> Nigel N.T. Li prefers the term 'politically correct' (Interview with Li on 17-JUN-2013) but this thesis considers that when a decision-maker seeks a politically correct answer, he or she is unquestionably acting strategically.

for maximising judicial power, fall within the gravitational sphere of public opinion, turning the Judicial Yuan *de facto* into a majoritarian institution. The court learns to understand public opinion and to formulate strategically correct decisions in order to ‘earn respect as a unit within its own political system’ because ‘this will allow the judiciary to capture more resources and enhance their political and social influence’ (Garoupa and Ginsburg, 2009: 453). US scholars have demonstrated the applicability of such models many times, even if the strength of the impact of public opinion upon federal judges is not always easy to identify or measure (Baum, 2006: 71-72; Wrightsman, 1999: 59-62). What is new and original about this thesis is its systematic application and adaptation of this model to Taiwan, where the influence of public opinion upon their Justices is shown to be evidential<sup>79</sup> (Wu, 2004: 585<sup>80</sup>).

At the core of this thesis we therefore situate the argument that the shift towards judicial supremacy in Taiwan during the 1990s is rooted in the relationship between the Justices<sup>81</sup> and public opinion. On this basis, judicial behaviour in constitutional cases in Taiwan on the whole can be modelled and perhaps even predicted according to the following formula: Taiwan’s Justices not only ‘want to maintain the court’s legitimacy and thus efficacy as a policymaker’ through withheld interest, maximising strategic

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<sup>79</sup> Statistics offer the best evidence: how could we explain that there was not a single case where public opinion backfired in the 1990s? In addition, why we only find cases in which the Judicial Yuan avoided provoking public opinion (such as the political question in *Judicial Yuan Interpretation No.328* [1993] or even the silence in *Judicial Yuan Interpretation No.476* [1999])?

<sup>80</sup> Here, Justice Wu’s book is cited because he frankly states on page 585 that in some cases there was no need to give the Justices ‘mighty invisible pressure’ (Wu, 2004: 585). By this we know that one of the greatest Justices in Taiwan’s legal history, Justice Wu Geng, was concerned with public opinion pressure.

<sup>81</sup> It is an open secret in Taiwan that the Justices are not all equal in importance, but there is no evidence that puts this beyond reasonable doubt. Generally speaking, the Justices prefer to be considered as one, and they rarely leak judicial lobby information to outsiders – even when they informed my research I was requested not to go public. At present this thesis only has Justice Wu’s interview to support this claim (Interview with Wu on 19-OCT-2004). However, my statistics regarding the Justices in Chapter 5 also provides systematic figures for studying the roles and the degree of activeness of each of the Justices.

attention to public opinion (Baum, 2006: 87), but also bear a heavy cultural burden imposed by the people's traditional expectations of judicial ideals (Shapiro, 1981: 157-193). Valerie Hoekstra also identifies two particular concepts with regard to public support for a court: firstly, diffuse support (general trust in the institution, broader value orientations and traditional understandings of judicial roles) as well as specific support (public opinion – or rather, the preferences of a majority of Taiwanese citizens in relation to a specific judicial decision) (Hoekstra, 2003: 12-15). For Taiwan's Justices in the 1990s, and in their quest for judicial self-interest at least in the realm of institutional independence, chances of success would have been very low if the court had ignored the implications of Baum's model and had failed to build on the two pillars of judicial support. The most convincing analytical framework for the Judicial Yuan, whether Justices pursue their own judicial independence in a self-interested way or try to maximise a sincere belief in a 'correct' way of interpreting the constitutional text, is the strength of both diffuse and specific public support in determining judicial deference or assertiveness. Whilst Ginsburg's analytical framework of a general trend towards judicial power maximisation results from the recognition of political opportunity for judicial assertion during the period of political fragmentation and democratic transition (Ginsburg, 2003: 106-157), this thesis offers a second and more refined explanation of judicial power expansion during the 1990s. This explanation coincides with a time period in which we also find variations of assertiveness and cases of judicial deference,<sup>82</sup> which Ginsburg's model cannot explain at all. That is to say we not only distinguish cases in term of assertive vs deferential, but we also look for variation within the group of assertive cases: Which are the most assertive cases? Which cases are assertive in terms of language but have no real-world impact? Which cases are only

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<sup>82</sup> E.g., *Judicial Yuan Interpretation No.328* [1993]. See also Chapter 9.3.

assertive in a limited way? In a nutshell, this thesis breaks new ground because it closes a major gap in Ginsburg's model which neither explains a binary understanding of the Judicial Yuan's decisions (assertive and deferential) nor offers a graded understanding of different levels of assertiveness or deference. What is peculiar to Taiwan is its fusion of the prominent role of public opinion in legal culture and its tradition of ideal types of judging, with the rational choice, strategic logic of judicial decision-making of public support (Hejl, 1993: 234).

Both Nigel N.T. Li and Tom Ginsburg agree that Taiwan's Judicial Yuan has become expert in making strategic decisions (Ginsburg, 2003: 106-157; Li, 2012: 332-352); this thesis moves this insight into new realms through the study of the audience preferences of the judges (judicial self-presentation<sup>83</sup>), and above all, public opinion (ibid; Marshall, 1989: 136-138). Baum's judicial self-presentation theory illustrates a crucial factor of the interrelationship between the Judicial Yuan and Taiwanese citizens: given the political development in Taiwan in the 1990s, the people benefited from Judicial Yuan interventions which strengthened democratic transition. At the same time, the court gained legitimacy and deep public support for judicial independence – both became inseparably bound together for good or ill.<sup>84</sup>

## **1.9 JUDICIAL POWER EXPANSION AND ITS LIMITATIONS**

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<sup>83</sup> Judicial self-presentation theory assumes that judges will decide in favour of their most important audience because 'people want to be liked and respected by others, especially those who are most important to their social identities. What they do to win popularity and respect can be understood as efforts to make favourable impressions. These efforts have been conceptualized as self-presentation' (Baum, 2006: 28).

<sup>84</sup> This thesis considers that the Judicial Yuan now finds itself confronting a different dilemma: can they stop Taiwan's public opinion moving towards radical populism? For example, could the Justices reverse Taiwan's eye-for-an-eye justice without repudiating the alliance between the judiciary and public opinion? In realistic terms, the Justices may become guardians of the constitution when the executive or the legislature are perceived as the wrongdoers, but what if public opinion is in the wrong, and the country's lawmakers are subjected to the tyranny of the majority?

Tom Ginsburg's study of Taiwan's judiciary has become a milestone in comparative constitutional law and constitutional politics. However, there is a gap in his work, as he does not explore the possibility of public opinion and public support as key variables in the expansion of Taiwan's judicial power. This thesis will therefore pick up Ginsburg's original question – 'how can a constitutional court that served an authoritarian regime become an instrument for democracy and human rights?' (Ginsburg, 2003: 106) – but offers different answers. Baum's judicial self-presentation theory – that judges will choose their own audiences according to the form of judicial self-interest they are pursuing (Baum, 2006: 39-42) – provides a window into the study of public opinion and court relations. In other words, if judges choose the public as their primary audience, it is because the public are the most important constituency in terms of support, and this support allows the court to expand its jurisdiction, defy the other branches of government and reinforce its own institutional independence.

Realistically speaking, should we expect a court to disregard its 'most important audience' (Baum, 2006: 28), or should we expect it to be bound by it in terms of decision-making (ibid)? If we agree that the court prefers a politically wise choice, Ginsburg's question can be answered in accordance with Baum's judicial self-presentation theory insofar as the Judicial Yuan shifted<sup>85</sup> its 'most important audience' (ibid) in the 1990s, from the authoritarian regime to public opinion, thereby changing the court's alliances. Baum's theory also explains both the fearfulness and hesitance of the Judicial Yuan concerning some specific types of cases – what if public opinion is

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<sup>85</sup> If we allow that the Judicial Yuan considers public opinion as its most important audience, in accordance with Baum, it seems to be reasonable to assume that the authoritarian regime was its most important audience before 1990.

politically divisive, or even biased, as in its cultural preference for capital punishment?<sup>86</sup>

It is worth noting that the Judicial Yuan has applied the political question doctrine twice in order to avoid becoming trapped in a political quagmire.<sup>87</sup> When public opinion is divided, there was no way<sup>88</sup> the Justices could have resolved the case without angering half the population, so they re-presented the case as a political question. That is to say, even a very powerful constitutional court can sometimes have feet of clay (Hirschl, 2004: 84-86). But what does not change is that the power of the court is political in origin (ibid: 71-108), and is thus subject to changing contexts and never politically invincible.<sup>89</sup> It therefore becomes critically important to examine the real cause of the Judicial Yuan's political apprehension. *Judicial Yuan Interpretation No.328* [1993] and *Judicial Yuan Interpretation No.476* [1999] are key examples of judicial passivism, and are therefore crucial from the analytical perspective of this thesis in terms of comparing cases of assertion with cases of deference, as they contain the variables that matter most in judicial decision-making, by contrasting cases with different outcomes and finding which variables have changed.

In contrast, the judiciary is always bound by its audiences – including the mass, media, the legal profession or academia – to actively enhance and maintain the influence of

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<sup>86</sup> See also Chapter 9 in detail.

<sup>87</sup> *Judicial Yuan Interpretation No.328* [1993]; *Judicial Yuan Interpretation No.419* [1996].

<sup>88</sup> Borrowing Hirschl's term, this is a 'no-win political dilemma' (Hirschl, 2004: 85) In Alexander Fischer's words, it is a 'lose-lose political situation'. Take *Judicial Yuan Interpretation No.328* [1993] as an example; it was a Brexit-like case – how could such a political decision be made without angering half the population?

<sup>89</sup> Nigel N.T. Li holds that the legislature is always the greatest threat to the judiciary (Interview with Li on 17-JUN-2013). Meanwhile Hirschl explains the political grounds on which the legislature would accept the delegation of law-making authority to the court (Hirschl, 2004: 84-86). What we learn from this is that the court is not politically invincible.

judiciary (legal-political realism) (Garoupa and Ginsburg, 2009: 452-490). In Taiwan, the Judicial Yuan itself has chosen public opinion as its most important audience, and public opinion has thus become the most important factor in limiting the Justices' choices when making decisions (judicial self-presentation) (Baum, 2006: 25-49). Moreover, Georg Vanberg's study of the German Constitutional Court has also established that public opinion, under specific circumstances, is very influential to judicial decision makers, acting as an indirect enforcement mechanism (Vanberg, 2005: 1-178). One of the best examples is Taiwan's Judicial Yuan's declaration that the death penalty was constitutional<sup>90</sup> because of public opinion, even though the abrogation of the death penalty has become the majority voice in the law society (Su, 2000: 178-198). Nigel N.T. Li further highlights that Justice Su Jyun-Hsiung, a self-confessed proponent of abolishing the death penalty, surprisingly has submitted no dissenting opinion in this case (Li, 2012: 341).

Another important layer of evidence for this thesis consists of political question doctrine cases – in other words, the things we learn when the Judicial Yuan decides not to decide. In comparison with the US Supreme Court, this thesis concludes that the Judicial Yuan has neither docket control<sup>91</sup> (Fontana, 2011: 624-641) nor a system<sup>92</sup> of deciding each case along a fixed roster of submission (FIFO). A case in the Judicial Yuan may be decided with 4 weeks or take as long as 4 years. Research for this thesis was inconclusive as to whether or not the Judicial Yuan delays cases, deciding them during

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<sup>90</sup> *Judicial Yuan Interpretation No.476* [1999].

<sup>91</sup> Originally the thesis proposed an examination of the statistics on docket control in the 1990s but this aspect of the project was unsuccessful, as because instruments of appeal did not note the dates of submission. However, the research did discover that the duration of court action is irregular – from weeks or months to between 2 and 4 years. Accordingly, I can conclude that the Judicial Yuan had no docket control.

<sup>92</sup> For example, *Judicial Yuan Interpretation No.261* [1990] was appealed on 3 April 1990 and decided on 21 June 1990; but *Judicial Yuan Interpretation No.264* [1990] was appealed on 10 February 1990 and decided on 27 July 1990 – there is no first-in-first-out rule in Judicial Yuan.

a big event, when people are distracted, or postpones them until the issue resolves itself. Technically they are capable of doing both, but this research shows that political doctrine cases are particularly relevant as evidence for strategic engagement with public opinion. The Judicial Yuan does not want to alienate half of Taiwan's citizens, so it sometimes opts out, refusing to render a decision, although normally, it is not scared of being political at all.<sup>93</sup>

The application of political question doctrines in Taiwan particularly illustrates that there are some cases that the Judicial Yuan prefers not to touch because of the pressure imposed by public opinion upon the Justices (Wu, 2004: 585). A political analysis of these 'disfavoured cases' shows that the Judicial Yuan has successfully managed to read public opinion in these cases, correctly predicting a division of public opinion and a consequent lose-lose situation for court.<sup>94</sup> The Judicial Yuan strategically avoids deciding on the merits of such cases (Gerhardt, 2000: 120), allowing the citizens of Taiwan to continue to imagine that the Justices share their views. If the Judicial Yuan were to make decisions on certain cases, it would lose the support of half the population – not just for the specific case, but because the issue is sufficiently dramatic that general support would be affected too. Justice Wu Geng, who made decisions on political question cases in the 1990s, even confessed that the applications of the political question doctrine were nothing more than an opposing strategic judicial decision (Wu,

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<sup>93</sup> Nigel N.T. Li further holds that the Judicial Yuan is designed to be constitutionally political (Interview with Li on 17-JUN-2013). In Li's classroom, he compares the Judicial Yuan and the US Supreme Court, teaching his students that the Judicial Yuan was born to be political (ibid).

<sup>94</sup> In the political situation between Taiwan and China, if the Justices were to decide whether the Chinese mainland is still part of the ROC territory or not, would they anger half the population? This is the core of the *Judicial Yuan Interpretation No.328* [1993] in which the Justices applied the political question doctrine – a divisive case that touches the core of Taiwanese national identity.



2004: 584-585). That is to say the Justices in Taiwan would prefer<sup>95</sup> a strategic<sup>96</sup> decision to be made by avoiding such a case instead of making a sincere decision in cases on which the Judicial Yuan could not read public opinion with a clear majority. This is illustrated by Justice Wu Geng's confession on *Judicial Yuan Interpretation No.328* [1993]:

As everyone knows, this case was appealed due to the political debate on the reunification/independence issue in the Legislative Yuan; therefore, the consequences would be more serious or deadly if the Judicial Yuan made a concrete answer in this case.<sup>97</sup> (ibid: 584)

Cases like *Judicial Yuan Interpretation No.328* [1993] and *Judicial Yuan Interpretation No.476* [1999] promote the argument that judicial supremacy in Taiwan is driven by the relationship between the Judicial Yuan and public support. On one hand, the Judicial Yuan accumulates its own democratic legitimacy by staying in line with the preferences of public opinion whenever possible and avoiding decisions altogether if public opinion is divided. On the other, Taiwan's constitutional judicial decision-making is thus limited into fewer choices controlled by the boundaries of majoritarianism because of the preferences of the majority of citizens.

## 1.10 CONCLUSION

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<sup>95</sup> As mentioned previously, Taiwan's Justices in the 1990s prefer to be considered as a singular body, so that they could make strategic decisions together, instead of making sincere decisions respectively in cases in which public opinion is divided or biased. No judicial opinion was submitted in this type of case.

<sup>96</sup> My research also discovered that no case that involved political controversies was not decided *en banc* in the 1990s and I do not believe this was a coincidence. See also Chapter 5 in detail.

<sup>97</sup> Author's Translation.

The concept of public opinion as an important cultural element has shaped Chinese political developments towards mechanisms of indirect democracy for almost five millennia. Hence, in the flow between Chinese political philosophy and Chinese social history, ideal types of legitimacy celebrate rulers who exercise political power in accordance with the common will of the people (Bloom, 2009: 156-168).<sup>98</sup> In such an environment, it is natural that the executive and the legislature pursue their quest for power and legitimacy in accordance with this cultural mechanism, and that judges also fine-tune their actions in the same way – or else the image of a doctrine of checks and balances will sadly prove ineffective.

According to Shapiro (1981: 157-193), such cultural elements have always played an important role in judicial decision-making in China, as they have in other cultural systems. The arguments presented over the following chapters not only embrace Shapiro's theory of system justification, arguing that Taiwan's Justices 'within a given cultural system are motivated to perceive existing social structures as legitimate, fair, and valid' (Anson et al., 2009: 211), but also use the Montesquieu's classical separation of powers model as an analytical framework with the Judicial Yuan as a political player seeking to maximise its power as much as possible, imposing its will upon the other branches (Posner, 1993: 1-41). Through quantitative approaches and the examination of original datasets, this thesis analyses and describes the reality of judicial power expansion in new and empirical ways. At the same time, the key hypothesis of the thesis – that the origins of judicial power within Taiwan's judiciary-public opinion alliance are formed by the Judicial Yuan – is tested through qualitative evidence that derives

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<sup>98</sup> Like Rousseau's *volonté générale*, the common will can of course offer a basis for authoritarianism. This thesis argues that the Chinese political tradition of *volonté générale* can support both fierce democracy (*la Terreur*), and fierce resistance against those who oppose the common will. Questions on whether the common will is just or not shall be identified on a case-by-case basis, and legal/philosophical justifications are beyond the remit of this thesis.

from interviews and unpublished primary sources from Taiwan's extensive system of official records and archives.

The Justices' ability to have the last word and to impose common will upon other branches of government works because Mencius has provided them with theoretical advantages in judicial power expansion. Through public support (Hoekstra, 2003: 12-15), the Justices know that they have little to fear in terms of retaliation by the executive and the legislature when they chose judicial assertiveness. However, the Judicial Yuan has also constructed a clear boundary for judicial power expansion. In other words, public opinion in Taiwan has become both a 'tiger' that helps the Judicial Yuan to impose its will upon the other branches of government, as well as a 'tiger' that the Judicial Yuan does not 'dare to pet' (ibid).

## 2: THE HISTORY OF THE JUDICIAL YUAN PRE-1990

### 2.1 INTRODUCTION

The Judicial Yuan has been Taiwan's supreme judicial body since the end of the Second World War, although it was officially founded on the Chinese mainland at Nanjing in November 1928, at a time when Taiwan was part of the Japanese Empire. Before Taiwan's restoration to the ROC under Article 8 of the 1945 Potsdam Declaration, the Judicial Yuan had no jurisdiction over Taiwan – however, its jurisdiction is now mainly limited to Taiwan, and has been since the end of the Chinese Civil War in 1949 because of the communist revolution.

Before the implementation of the ROC Constitution, the role of the Judicial Yuan was politically unclear. In theory it was formed in accordance with the nationalist Pentapartite constitution, but this furnishes it with almost no judicial mechanism apart from judicial independence, because the founder of the theory, Sun Yat-Sen, was no more than a political leader. The role of the Judicial Yuan therefore depended on authoritarian politics until 1947.

The Constitution, however, provides a clear role for the Judicial Yuan, stipulating that the Judicial Yuan is the supreme judicial body<sup>99</sup> and exclusive constitutional court<sup>100</sup> of the ROC. Ironically, the Judicial Yuan remained inactive after the implementation of the Constitution due to the Chinese Civil War. The ROC was totally defeated by the communists in 1949, and the authoritarian government called for state of emergency

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<sup>99</sup> Constitution of R.O.C. § 77 (1947).

<sup>100</sup> Constitution of R.O.C. § 78 (1947).

under which the Judicial Yuan chose to serve (Ginsburg, 2003: 106) in Taiwan until 1990.

In 1990, the Judicial Yuan dismissed the authoritarian congress and opened the gate for democracy in Taiwan.<sup>101</sup> However, little attention has been paid to what the Judicial Yuan had done between 1947 and 1990, so Ginsburg's conclusion that the Judicial Yuan's dramatically transformation from 'a constitutional court that served an authoritarian regime' into 'an instrument for democracy and human rights' (Ginsburg, 2003: 106) remains puzzling. Historical evidence shows that the Judicial Yuan never came under the full control of the Nationalist Government between 1947 and 1990, and that the Justices still tried to play a proper role under Taiwan's state of emergency.

This chapter addresses the history of the Judicial Yuan before 1990, outlining the construction of an entity that grew in strength until it gained an identity of its own.

## **2.2 PRE-CONSTITUTION PERIOD**

The Judicial Yuan was based upon Article 77 of the Constitution, taking the role of supreme judicial authority of the modern ROC despite its original formation<sup>102</sup> by Chiang Kai-Shek's Nationalist Government on the Chinese mainland at Nanjing in November 1928 (Sze and Tsai, 2007: 708). It was organised as one of five branches of the ROC Government according to 'the teachings bequeathed by Dr Sun Yat-sen in founding the Republic of China'<sup>103</sup> as part of the nationalist Pentapartite constitution

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<sup>101</sup> *Judicial Yuan Interpretation No.261* [1990].

<sup>102</sup> Organic Law of the Nationalist Government of R.O.C. § 5 (1928).

<sup>103</sup> Constitution of R.O.C. pmb. (1947).

(ROC Ministry of National Defense, 1973: 1-93). However, neither the role of the Judicial Yuan nor the scope of its judicial power were clearly demarcated, because Sun Yat-Sen had 'bequeathed' it nothing beyond judicial independence (Chuang, 2007: 372-379). Since the publication of the Pentapartite constitution (Blaustein, 1993: 31-32) in 1906, an unsophisticated idea developed by a politician who had never studied law has become a fundamental part of Chinese nationalist constitutionalism (Ching, 1984: 437-445). This appears to reflect a cult of personality surrounding Sun Yat-Sen, because no one really knew the nature of judicial power within this Pentapartite system, especially in contrast with the Tripartite system.

The Pentapartite system was little more than a fancy constitutional concept invented by Sun Yat-Sen via the creation of two independent powers of impeachment and civil service examination that were supposed to work alongside the classical three powers, making a system with five branches of government. Sun declared the system to be the most suitable constitutional mechanism for China (Sun, 1970: 29-34), in spite of the fact that it was crude and based on nothing more than nationalist political beliefs (Lee, 2000: 131-133). It quickly became a burden on the ROC Constitution imposed by the nationalists, although the ultimate Pentapartite system adopted by the Constitution was largely modified and streamlined by Carsun Chang (Yang, 1993: 129-132), along with Wang Chung-Hui, and John C.H. Wu (Ching, 1984: 413-419). Before this, the Judicial Yuan was run as an organ with no clear and exclusive position before the implementation of the 1947 Constitution.<sup>104</sup>

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<sup>104</sup> Since the Imperial period, a court of final appeal named the Dah-Li Yuan was formed, which exercised the judicial power of final appeal after the ROC was established (1906-1928). The nationalists renamed the Dah-Li Yuan the Supreme Court in 1927 and it has operated under that name to the present day. Before the implementation of the Constitution appointing the Judicial Yuan as the constitutional court, the Supreme Court was still the court of final appeal within the ROC. In other words, it appears odd that China needed a Judicial Yuan over a court of final appeal between 1928 and 1947, particularly as the Judicial Yuan was neither redesigned as a court of final appeal nor commissioned as a

It is reasonable to conclude from his personal experience and writings that Sun Yat-Sen had only a limited knowledge of judicial power. He was trained academically to be a physician in Hong Kong (HKU) (Chuang, 2007: 139-156), and held no legal or political qualifications. Moreover, his interpretation of judicial power, according to the literature, is informed by nothing more than Sun's own common sense. The absence of a precise constitutional role for judicial power resulted in structural pathologies towards the ROC judiciary (Li, 2001: 8; Sze and Tsai, 2007: 708-709); however, it also provided possibilities for unexpected judicial developments.

Justice Tung Hsiang-Fei noted the best examples to explain the uncertainty of the role of the Judicial Yuan. He found that the original Judicial Yuan was not only the court of final appeal,<sup>105</sup> but was also in charge of the judicial administration that had supervised the lower courts since its establishment in 1928.<sup>106</sup> The Judicial Yuan's supervisory powers over the magistrates' courts and high courts was taken away by the Executive Yuan in 1931 – only to be returned three years later, in 1934, before being taken away for a second time in 1941 (Tung, 2005: 463). Obviously, the power of supervision over magistrates' courts and high courts was arranged capriciously amongst the judiciary and the executive because of uncertainties surrounding the precise role of the Judicial Yuan, although the most convincing explanation regarding the persistent reorganisation of the Judicial Yuan remains political.

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constitutional court.

<sup>105</sup> The first version of the Organic Law of the Judicial Yuan, announced on 20 October 1928, stipulates that the Judicial Yuan shall be the court of final appeal. *Compare* Organic Law of the Judicial Yuan § 5 (October 1928), *with* Organic Law of the Judicial Yuan § 5 (October 1928). However, this was modified on 17 November 1928 (28 days later) and the Supreme Court became the court of final appeal again. *See also* Organic Law of the Judicial Yuan § 5 (November 1928).

<sup>106</sup> Organic Law of the Judicial Yuan § 4 (October 1928).

Despite the lack of any direct evidence proving that the Judicial Yuan's loss of supervisory power in the 1930s and 1940s was due to political interference by the ruling Nationalist Party, it is generally agreed that the power was always taken away when Chiang Kai-Shek or his associates were the Heads of Government. In contrast to the history of the Executive Yuan in the 1930s, the most persuasive explanation as to why the Judicial Yuan reclaimed its supervisory powers in 1934 was also political, because Chiang's strongest political enemy within that period, Wang Jing-Wei, was commissioned Head of Government in 1932 (Chiang, 2009: 274-284). After the fall of Wang's faction within the Nationalist Government, supervisory power was once again transferred to the Executive Yuan in 1941, and all the magistrates' courts and high courts remained under the supervision of the Executive Yuan until Chiang Kai-Shek's death in 1975 (Tung, 2005: 440-442).

Despite the Nationalist Party's political intervention, the Judicial Yuan had still not been designated as a constitutional court because there was almost no separation of powers in the Basic Law before 1947 (Ching, 1984: 383-393). According to Sun Yat-Sen's teachings, the Nationalist Party safeguarded China's democracy, and was thus responsible for the 'political tutoring' in constitutionalism<sup>107</sup> of the Chinese people for a limited time period (Kuei, 2008: 184-212) before the promulgation of the Constitution of 1947. During that political tutelage period, the Basic Law of 1931 – as China's constitutional law – had legitimised the Nationalist Party's autocracy<sup>108</sup> as a proper safeguard in order to prepare for the implementation of a more formal constitution (Ching, 1984: 394-400). In other words, Sun Yat-Sen truly believed that a democracy could be founded by an autocracy, so it is easy to imagine political intervention against

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<sup>107</sup> Basic Law of R.O.C. pmbl. (1931).

<sup>108</sup> Basic Law of R.O.C. § 30 (1931).



the Judicial Yuan in the years leading up to 1947.

At this juncture it should be pointed out that the Nationalist Party had no intention of politically tutoring China indefinitely. A first draft constitution was promulgated by the Nationalist Government on 5 May 1937, and the nationalists planned to summon the Constituent National Assembly in November <sup>109</sup> (Chang, 2006: 65-73). The communists' accusation of permanent autocracy against the nationalists (Zhang, 2004: 238-250) is in contrast to history, but the organic defect of Sun Yat-Sen's political tutelage theory offered the ROC judicial independence dating back almost seven decades from 1928 to the 1990s.

During the political tutelage period (1928-1947), the Judicial Yuan was merely an institution that 'served an authoritarian regime' (Ginsburg, 2003: 106). Its supervisory power towards the magistrates' courts and high courts was politically removed by Chiang Kai-Shek, and the Judicial Yuan was not even a constitutional court.<sup>110</sup> The power of interpreting the Basic Law was (probably for political reasons) given to the Central Executive Committee of the Nationalist Party.<sup>111</sup> Sun Yat-Sen's political tutelage theory had structurally weakened both the function of judicial power and the performance of judicial independence within the ROC, and the Judicial Yuan was little more than a symbolic governmental organ in the pre-constitution period.

## **2.3 DR CARSON CHANG'S CONSTITUTION OF 1947**

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<sup>109</sup> The 1937 Constituent National Assembly was terminated because the Second World War in China broke out on 7 July 1937 (Hsieh, 2007: 16-17).

<sup>110</sup> Basic Law of R.O.C. § 85 (1931).

<sup>111</sup> Id.

The ROC Constitution – which was actually implemented by and on behalf of China as a whole on 25 December 1947, before China’s disunion – remains effective as part of modern Taiwan’s fundamental law. It was absolutely not drafted by the Nationalist Party,<sup>112</sup> as the communists officially allege (Bian, 2006: 155-163; Yang, 1987: 18-20) in their historical discourses. However, it was boycotted by the Communist Party, and became one of the grounds for conflict that resulted in the Chinese Civil War (Fenby, 2003: 460-472). The legitimacy of the Constitution has been criticised by the communists, even though it was formed in a completely lawful manner. Its draftsman, Carsun Chang, was the chairman of the Chinese Democratic Socialist Party, and presided over the Constituent National Assembly which harmonised Chinese nationalist constitutionalism in 1946 (Chen, 2005b: 32-35; Wu, 2004: 51-54). The rival Nationalist Party did not favour this version of the Constitution (Ching, 1984: 453-456; Wang, 2000: 17-21) and suspended it through a series of (partially wartime) constitutional amendments over the following 42 years (1949-1990). After the implementation of the Constitution in 1947, the Judicial Yuan became the ROC constitutional court, although its first judgement was not held until 6 January 1949.

Unlike Sun Yat-Sen, Carsun Chang was a legal philosopher who believed in German-style social democracy (Jeans, 1997: 41-47). He earned his doctorate at the University of Berlin (Humboldt) and was a student of Rudolf Eucken and Henri-Louis Bergson. Chang lectured at many universities in China, although he was expelled by the nationalists twice. He also lectured in Germany (Jena), India (Delhi and Calcutta), and the United States (Stanford) and helped draft the Charter of the United Nations in 1945

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<sup>112</sup> The nationalist Draft Constitution was abandoned by the National Assembly under the threat of nonattendance from the Young China Party (YCP) and the China Democratic Socialist Party (CDSP) that held 20% of representatives (Nationalist: 31.4% and Communist: 27.1%) in the National Assembly.

(Jiang, 1980: 409). Much of the literature suggests that he deliberately harmonised or even intended to expunge Sun Yat-Sen's unique constitutional designs from the Constitution, although he knew that it was impossible to completely ignore the nationalist constitutionalism 'bequeathed by Sun Yat-Sen' (Kuei, 2008: 239-300; Wang, 2000: 21; Wu, 2004: 51-54).

According to Carsun Chang's speeches (Chang, 1947: Chapter 7), he believed in a constitutionalism that embraced judicial supremacy. This meant that the ROC judicial power under his Constitution is defined in both abstract and concrete terms. Articles pertinent to the mechanism of the Judicial Yuan are always abstract, but articles in relation to its role are always concrete; more tellingly, there are no articles to be found within the Constitution concerning limitations on the use of judicial power. Indeed, Carsun Chang stated that the Judicial Yuan enjoyed the powers to 'interpret the Constitution' and to 'unify the interpretation of laws and orders' exclusively,<sup>113</sup> and laid down no strict methodologies or demarcations on how to exercise these powers. Moreover, the Judicial Yuan was deemed the supreme judicial authority<sup>114</sup> and the exclusive constitutional court,<sup>115</sup> and was entitled to define and interpret the nature of the Constitution.<sup>116</sup> With this came a regulation that any doubts of unconstitutionality that arose must be decided by the Judicial Yuan only.<sup>117</sup> Hence, Carsun Chang commented:

[T]he jurisdiction of the [Republic of China's] judiciary not only refers

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<sup>113</sup> Constitution of R.O.C. § 78 (1947).

<sup>114</sup> Constitution of R.O.C. § 77 (1947).

<sup>115</sup> Constitution of R.O.C. § 79II (1947).

<sup>116</sup> Constitution of R.O.C. § 173 (1947).

<sup>117</sup> Constitution of R.O.C. § 171 (1947).

to adjudications between civilians and civilians, or between civilians and officials, but further includes constitutional judicial review power against both congressional legislations and the President's administrative discretion. [Our] rule of law shall not be considered successful, ultimate or prefect until such a power is exercised, the power of judicial supremacy.<sup>118</sup> – Carsun Chang (1946)

In contrast to articles relating to the mechanisms of the Judicial Yuan, the Constitution provides concrete protection for the entire judiciary. For example, every judge is protected from being removed, transferred, suspended or having his salary reduced by anything other than legal means (*Gesetzesvorbehalt*),<sup>119</sup> and no judges shall be legally bound by judicial precedents (*Verfassungsvorbehalt*).<sup>120</sup> In other words, the Constitution was deliberately written in order to provide judicial safeguards against political intervention.

Ironically, the Constitution was not politically appreciated by either the nationalists or the communists. According to Carsun Chang, the Communist Party was the first political interest group that favoured and supported judicial supremacy (Yang, 1993: 130-131), but after the revolution they boycotted the Constitution, claiming it had exclusively designed by and for the nationalists<sup>121</sup> (Xiao, 2002: 74-79). Meanwhile the Nationalist Party followed the Weimar precedent, suspending the Constitution partially by a declaration of state of emergency (ROC National Assembly, 1961: 267-268) that

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<sup>118</sup> Author's Translation.

<sup>119</sup> Constitution of R.O.C. § 81 (1947).

<sup>120</sup> Constitution of R.O.C. § 80 (1947).

<sup>121</sup> The most illogical example (given by Xiao Wei-Yun of Peking University) concerns Article 23 of the Constitution. Xiao insists that this Article is specially designed to benefit the Nationalist Party (Xiao, 2002: 76). The article refers only to the principle of proportionality, yet it has become the most powerful weapon against the ROC Government.

lasted 44 years. In real terms, neither the nationalists nor the communists adjusted well to a constitutional republic – they mainly sought to maximise their own political influence by respectively supporting or boycotting the Constitution. However, the process marked the start of China’s (and Taiwan’s) long march towards judicial independence – the ROC has been ruled more or less exclusively by Carsun Chang’s democratic Constitution since 1947.

## **2.4 A HARD POLITICAL DECISION: STAY OR RETREAT?**

It is beyond doubt that the Nationalist Party and the Communist Party have played the two decisive roles in the 20th century Chinese politics (Gupte, 1974: 1-670), and that the relationship between the two parties has always been – and is still – considered a political problem of great complexity in the Chinese world. The word ‘communism’ is still a synonym for ‘immorality’ and ‘enemy’ in modern Taiwan,<sup>122</sup> while the nationalists are not portrayed positively in mainland Chinese textbooks (People’s Education Press, 2000: B2 50-56).

People of Chinese origin are easily labelled as either nationalists or communists, depending on their philosophies or ideologies, but such labels are simplistic and often erroneous. For example, if a Justice chose to remain in Mainland China after the Chinese Civil War, he would be labelled as a communist – even though he might just want to stay at home instead of retreating to Taiwan with the nationalists. Similarly, if a Justice decided to move to Taiwan after the War, he would in objective terms be labelled as a nationalist as well, whereas he may have been a ROC national with no real

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<sup>122</sup> See *Judicial Yuan Interpretation No.644* [2008] (Lin Tzu-Yi, concurring).

political affiliation. In other words, a Justice's political leanings, irrespective of whether he was labelled as a nationalist or a communist, cannot be ascribed without providing further evidence. Overall, however, the number of Justices who decided to move to Taiwan – as well as the number who chose to remain on the mainland – might be meaningful in that it offers a broad picture of the independence of members of the Judicial Yuan in the initial stage. Table 2.1 shows a list of Justices and the residence decisions they made in the wake of the 1949 revolution.

### 2.1 List of First-term Justices' Decision after 1949

DECISION	JUSTICES
Retreat to Taiwan	<i>Hu Pou-Yeh</i> (1894-1985) <i>Chang Yu-Shun</i> (1887-1951) <i>Lin Bin</i> (1893-1958) <i>Yueh Jai-Jun</i> (1885-1951) <i>Wei Da-Tong</i> (1893-1950) <i>Su Shi-Shun</i> (1890-1970)
Stay in Hong Kong	<i>Hsia Chin</i> (1892-1950)
Death during Retreat	<i>Lee Pou-Shen</i> (1887-1951)
Remain in the mainland	<i>Yan Shu-Tang</i> (1891-1984) <i>Huang You-Chang</i> (1885-1970) <i>Hong Wen-Lan</i> (1891-1971) <i>Liu Ke-Jun</i> (1893-1974) <i>Shen Jia-Yi</i> (1881-1954) <i>Hsiang Che-Chun</i> (1892-1987)
Death before Disunion	<i>Chang Shih-I</i> (Unknown-1948)
Did Not Report for Duty	<i>Jiang Yong</i> (1878-1960) <i>Chi Chao-Jun</i> (1882-1965) <i>Weng Jing-Tang</i> (1884-1956) <i>Mei Ju-Ao</i> (1904-1973) <i>Li Hao-Pei</i> (1906-1997)

(Source: Compiled by the author)

The Judicial Yuan's first-term Justices (1948-1958) were the only ones who had to make a decision between retreating to Taiwan and remaining on the mainland; surprisingly, they gave historians and constitutional legal scholars a perfectly balanced figure: six Justices remained on the mainland whilst six retreated to Taiwan. Initially there were seven, but one (Lee Pou-Shen) died on the journey. Although the figure is finely balanced, it does not demonstrate that 50% of first-term Justices favoured a communist republic, although it is still persuasive enough to allow us to conclude that the Nationalist Government did not wield total control over the Judicial Yuan.

According to Judicial Yuan publications, President Chiang Kai-Shek had made the initial appointments of first-term Justices – 17 candidates in all – to the Control Yuan<sup>123</sup> on 14 July 1948 (ROC Judicial Yuan, 1998: 55-56). Five candidates were rejected by the Control Yuan, and two of the appointees – Jiang Yong and Chi Chao-Jun – did not report for duty. The remaining appointees were granted their commissions by the Control Yuan the following day, and heard the first two constitutional cases<sup>124</sup> in the nationalist Chinese capital, Nanjing, on 6 January 1949. After the Chinese Civil War, four out of ten Justices chose to remain on the mainland, whilst five decided to retreat to Taiwan; however, as mentioned above, Justice Lee Pou-Shen did not reach Taiwan – he was captured by the communists and died in prison in 1951.

President Chiang Kai-Shek was forced to resign on 21 January 1949 after failing to account for military frustration against the communists (Kuo, 1986: 763-766). Vice President Li Tsung-Jen succeeded him, and renewed the appointments of the first-term Justices – 8 candidates – on 31 March 1949. Three of President Li's appointees did not

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<sup>123</sup> Constitution of R.O.C. § 79I (1947).

<sup>124</sup> *Judicial Yuan Interpretation No.1* [1949]; *Judicial Yuan Interpretation No.2* [1949].

report for duty: Mei Ju-Ao, Li Hao-Pei, and Weng Jing-Tang. The remaining five were commissioned. After the Chinese Civil War one of the five, Justice Hsiang Che-Chun, remained in the mainland, while three Justices retreated to Taiwan. The remaining Justice, Justice Hsia Chin, stayed in Hong Kong because of illness.

The chronicle of the first-term Justices is detailed and fascinating: either the Nationalist Party was too generous in appointing Justices who would never be controlled, or the Nationalist Party underestimated the independence of Chinese judges in the 1940s. If the Judicial Yuan was completely a subsidiary of the Nationalist Government, as the communists suggest, it would be reasonable to anticipate more favourable outcomes for the nationalists, and that more of the Justices would have moved to Taiwan. However, the outcome of the stay-or-retreat decisions made by the first-term Justices must surely have surprised the nationalists, but it stands as a good illustration of judicial independence and impartiality in the ROC in the 1940s.

As a result of the complexity of the political interrelationships between the nationalists and the communists, the greatest concern for the first-term Justices in the Chinese world is undoubtedly the political preferences shown towards these Justices. Records show that Justices Lin Bin and Hu Pou-Yeh were the only two who were by their own admission nationalists – they were both registered as party members, and they both enjoyed high-flying careers in government circles (ROC Judicial Yuan, 1998: 77-223). Justice Lin Bin even tried to stop the government from being investigated by the Control Yuan in 1953.<sup>125</sup> In fact, there is no literature that lists the party memberships of all 15 Justices, while the evidence obtained is too unreliable to categorise any of the remaining

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<sup>125</sup> Control Yuan's Censure against the Supreme Prosecutors Office, pmb. (11 February 2009).



### 13 Justices as either nationalists or communists.

Unearthing the political preferences of these Justices through a study of their legal education backgrounds is a rather fruitless task. Ordinarily, nationalist jurists are more likely to be educated in Germany or Austria because Taiwan's nationalist legal system was transplanted from Europe and constructed on the German model. It is therefore deeply influenced by German jurisprudence<sup>126</sup> (Newman, 2010: 222-223) dating back to a period of Sino-German cooperation in the 1920s (Ma and Qi, 1998: 1-39). However, the first generation of Justices were all born before the founding of the ROC in 1912, and most of them were educated during the Imperial period, obtaining their legal education from universities in China, Japan, France and the United States. None were educated in German speaking universities. In contrast to the predomination of German law degrees among Justices of subsequent generations, the most crucial part of the ROC's legal-academic culture – deliberately introduced by the nationalists from Germany – did not dominate the Judicial Yuan in its initial stages. In other words, if the definition of 'nationalist jurists' refers to those who were bred under the nationalist legal culture, they would still have been too young to sit on the Judicial Yuan in the late 1940s.

Due to the lack of literature under the political systems of anti-communism in Taiwan and the Cultural Revolution in mainland China, it is difficult to undertake a detailed background survey of all of the 20 appointees listed in Table 2.1. However, a piecemeal investigation can still be accomplished which is helpful in providing a snapshot of the first days of the Judicial Yuan's history. Unfortunately, this seems to be the best that we

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<sup>126</sup> Mark Williams: '[T]he predominant legal-academic culture in Taiwan has been heavily influenced by German jurisprudence and training ... the German system was thought to be a desirable object for transplantation to Taiwan, especially as much of the Taiwanese legal system originated in the adoption of a German inspired codal system by the ROC in the 1920s' (Williams, 2005: 382).

can expect at the moment.

## **2.5 MOVING FROM NANJING TO TAIPEI**

As one of five branches of the ROC Government, the Judicial Yuan has always been located in the nationalist Chinese capital, although this capital had no permanent location until the government retreated to Taipei in 1949. Through a broad political consensus at the foundation of the ROC in 1912, the capital was temporarily sited at Nanjing – a city about 450 kilometres away from Shanghai (Li and Li, 2008: 390-395). However, it was moved to Beijing by President Yuan Shi-Kai shortly afterwards (ibid). Nanjing became the capital again in 1927 when the nationalists came to power, but the city fell into Japanese hands during the Second Sino-Japanese War (the Second World War in China, 1937-1945) (Hsu, 2009: 169), and the capital was then relocated to Chungking. At the end of the Second World War, the nationalists immediately moved the government back to Nanjing, but in April 1949 the city once more fell into enemy hands – this time the communists (Kuo, 1986: 765). The Judicial Yuan was moved along with the government several times before the ‘Great Retreat of 1949’ (Lin, 2009: 2-7).

Due to the political instability of the ROC on the Chinese mainland between 1912 and 1949, the Judicial Yuan was often forced to exercise its power under difficult circumstances within diverse temporary wartime settings located in different cities. It therefore came as a luxury for the Judicial Yuan to choose its own site and surroundings. Even the original Judicial Palace in Nanjing was rather unmemorable; it was built in 1935, occupied by the Japanese colonists from 1937 to 1945 and then burnt down by the communists in 1949. The Judicial Palace in Taipei was also considered as a temporary wartime refuge by the then Judicial Yuan – who considered it as an *ad hoc*

location borrowed from the Taiwan High Court.<sup>127</sup>

The *Judicial Yuan Interpretation No.31* [1954] is undoubtedly the best constitutional judicial review that sets out the Judicial Yuan's initial position following the Great Retreat of 1949. The case refers to the impossibility of re-electing legislators in both houses due to the fall of the Chinese mainland. The Judicial Yuan concluded that:

[O]ur state has been undergoing a severe calamity, which makes re-election of the second term of both Yuans *de facto* impossible. [...] Before the second-term Members are elected, convene and are convoked in accordance with the laws, all of the first-term Members of both the Legislative and Control Yuans shall continue to exercise their respective powers.<sup>128</sup>

*Judicial Yuan Interpretation No.31* [1954] mirrored the ROC's One China Policy during the 1950s, and the Judicial Yuan's choice was a sensible one. As opposed to having no legislature, it would be wise to maintain the old one in order to represent all of China. However, it was the timing issue that mattered; if the Judicial Yuan was to tolerate any temporary imperfections concerning the legitimacy of both houses, the Justices must believe that they would not endure in the long term. As a matter of fact, most Taiwanese believed at the time that the government would soon retake the Chinese mainland during the 1950s (Chen, 2005a: 221-227) because they thought the ROC was on the

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<sup>127</sup> It is reasonable to assume that the Judicial Yuan did not anticipate using the Judicial Palace of Taipei in perpetuity. In fact, the Judicial Yuan was one of a group of court systems that were squeezed into the Palace, which played host to four separate courts – the Judicial Yuan, the Supreme Court, Taiwan's High Court and Taipei's District Court.

<sup>128</sup> *Judicial Yuan Interpretation No.31* [1954] (Official Translation).

right side.<sup>129</sup> The first-term Justices made many decisions on a basis of such an expectation.

The first-term Justices (1948-1958) placed no *consilia* within their judicial reviews although second-term (1958-1967) Justices Wang Ji-Jong, Tseng Shau-Shun and Huang Yien-Wou submitted a dissenting opinion alongside their very first decision, *Judicial Yuan Interpretation No.80* [1958]. It was the first dissenting opinion ever expressed within the Chinese legal system, but more importantly it represented a small step on the road towards judicial independence in the ROC. Moreover, the second-term Justices went further than simply building a *consilia* system:

Article 77 of the Constitution stipulates that the Judicial Yuan is the highest judicial organ of the State and holds the judicial power over trials of civil and criminal litigation, the trials of which shall include trials of civil and criminal litigation at courts of all levels. In view of this fact, Article 82 of the Constitution, which stipulates that the structure of the Judicial Yuan and courts of all levels shall be organized by law and is incorporated into the chapter of the Judiciary intending to establish the consistency of the judicial system, contributes as cross-evidence. Based on this reason, all levels of courts and subsidiary courts below the High Court shall be subordinate to the Judicial Yuan. All relevant acts and regulations shall respectively be amended to comply with the concept of Article 77 of the Constitution.<sup>130</sup>

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<sup>129</sup> Retired Agent Tang Chu-Kuo of the ROC Secret Service said in his memoir that he is proud to have served the ROC because history shows that the nationalist republic is just, as opposed to the communist republic, even though the Government failed to retake the Chinese mainland (Tang, 1997: 8).

<sup>130</sup> *Judicial Yuan Interpretation No.86 Reasoning* [1960] (Official Translation).

It is said that *Judicial Yuan Interpretation No.86* [1960] represents the Judicial Yuan's first endeavour towards judicial independence, although it did not bring about the desired result. Whilst the Nationalist Government did not oppose the decision, it deferred any progress on the matter for nineteen years, until 1979 (Tung, 2005: 440-442; Wang, 2000: 240-241). In this sense, Ginsburg's comment that the Judicial Yuan was 'a constitutional court that served an authoritarian regime' (Ginsburg, 2003: 106) in the pre-democracy era is probably a little unfair, because the Judicial Yuan's efforts were rebuffed, rather than not existing in the first place. From the start of the second term, the Judicial Yuan showed willingness to confront the regime.

It was the third-term Justices (1967-1976) who were really voiceless, deciding only 24 cases over a nine-year period.<sup>131</sup> In retracing the political history of the ROC, a persuasive answer as to why the third-term Justices chose judicial deference centres around the state of emergency that existed at the time:

Recognizing that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations [...] to restore all its rights to the People's Republic of China and to recognize the representatives of its Government as the only legitimate representatives of China to the United Nations, and to expel forthwith the representatives of Chiang Kai-shek from the place which they unlawfully occupy at the United Nations and in all the organizations related to it.<sup>132</sup>

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<sup>131</sup> From *Judicial Yuan Interpretation No.123* [1968] to *Judicial Yuan Interpretation No.145* [1976].

<sup>132</sup> UN General Assembly Resolution 2758 (XXVI).

In 1971, the ROC was deprived of its representation in the United Nations and its place was given to the communist PRC.<sup>133</sup> The resulting domino effect in both domestic and international politics was predictable – the ROC lost official diplomatic ties with foreign countries, withdrawing from international organisations and setting the importance of political unity above domestic affairs. In other words, it was an era defined by an intense state of emergency, and one of the results of this was deference from the Judicial Yuan.

After Chiang Kai-Shek's death in 1975, the ROC quickly moved towards democratisation. The nationalists' final submission to *Judicial Yuan Interpretation No.86* [1960] in 1979 reflected a changed political atmosphere and sent a political signal to the fourth-term Justices (1976-1985) that it was the time for them to change too. In *Judicial Yuan Interpretation No.150* [1977], the fourth-term Justices placed the first caution on the legislators (Die sog Appellentscheidung), claiming that the Judicial Yuan would not tolerate any modification of the legislators' term of office constitutionally, although it could accept a temporary arrangement in political practice:

Due to national emergencies, although in reality it was impossible to conduct elections after the terms of members of the First Legislative Yuan's term had expired, in accordance with this Yuan's Interpretation No. 31 and to uphold the five-branches constitutional framework, members were allowed to continue to carry out their duties until the Second Legislative Yuan was elected and convened. Based upon this

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<sup>133</sup> Id.

Interpretation, only those who were already members at the time the term of the First Legislative Yuan expired could remain in office. [...] It is abundantly clear that these provisions were not created to alter the term of the first central representatives.<sup>134</sup>

The fourth-term Justices also set out an important doctrine for the future expansion of judicial power:

The interpretations of the Judicial Yuan shall be binding upon every institution and person in the country, and each institution shall abide by the meaning of these interpretations in handling relevant matters.<sup>135</sup>

From the perspective of legal-constitutional development, the Judicial Yuan was never fully controlled by the authoritative Nationalist Government from the very start, and sought to occupy a central political arena decade by decade. It is reasonable to conclude that neither the Congress Dissolution case<sup>136</sup> decided by the fifth-term Justices, nor the case of Striking Down the Unconstitutional Constitutional Amendment<sup>137</sup> determined by the sixth-term Justices were unanticipated judicial decisions. The Justices had been accumulating political capital step by step and generation by generation for the upcoming expansion of their judicial power.

## **2.6 CONCLUSION: NOMINATION AND CONCENT**

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<sup>134</sup> *Judicial Yuan Interpretation No.150* Reasoning [1977] (Official Translation).

<sup>135</sup> *Judicial Yuan Interpretation No.185* [1984] (Official Translation).

<sup>136</sup> *Judicial Yuan Interpretation No.261* [1990].

<sup>137</sup> *Judicial Yuan Interpretation No.499* [2000].

[T]he courts are all operated by and for the ruling [Nationalist] Party.<sup>138</sup>

– Hsu Shui-The, Secretary-General of the Nationalist Party (1995)

When we look back on the Judicial Yuan's history in terms of the Justices' nomination and consent, official records only reveal that Hsu Shui-The's 'dictum' (Yang Ho-Lun: The Journalist vol.437: 23 July 1995) was a good deal less than objective:

On 14 July 1948, the President nominated 17 candidates as first-term Justices and asked for the consent of the Control Yuan. [...] However, on 15 July, the Control Yuan [...] only gave consent to [...] 12 candidates. The remaining five – Shih Shang-Kuan, Liu Tong, Zhang Ying-Nan, Chou Shu-Yun and Chen Yi-Qing – were rejected.<sup>139</sup> (ROC Judicial Yuan, 1998: 55)

The President referred to here, on 14 July 1948, was the most powerful autocrat in the history of ROC, Chiang Kai-Shek. But surprisingly even Chiang could not appoint the Justices at will, making it hard to believe even in those early days that the Judicial Yuan was 'operated by and for the ruling [Nationalist] Party' (Yang Ho-Lun: The Journalist vol.437: 23 July 1995).

If President Chiang Kai-Shek's record was not already sufficiently astonishing, the rejection of Maestro Shih Shang-Kuan is almost beyond belief. Shih was a Humboldt graduate who was commonly considered the greatest proponent of civil law in China. He was also the draftsman of China's first civil code – the ROC Civil Code of 1929, a

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<sup>138</sup> Author's Translation.

<sup>139</sup> Author's Translation.



great deal of which remains effective in Taiwan today. Despite being approved as a Justice for a second term in 1958, his nomination by Chiang Kai-Shek was rejected by the Control Yuan in 1948. The rules of nomination specified that:

The Judicial Yuan shall have a certain number of Grand Justices to take charge of matters specified in Article 78 of this Constitution, who shall be nominated and, with the consent of the Control Yuan, appointed by the President of the Republic.<sup>140</sup>

Justice Shih Shang-Kuan's rejection was the first case but not the last. Chang Chien-Han was also rejected by the Control Yuan in 1976 (he was nominated by President Yen Chia-Kan on 8 September 1976):

[I]n that year [my] teacher Chang Chien-Han was nominated as a Justice but was rejected [by the Control Yuan]. [...] The old senators of the Control Yuan [...] firmly boycotted him [...] [and] finally there was a gentleman's agreement that [...] the old Senators gave him the minimum of consent but refused to swear him in. So [my] teacher Chang Chien-Han never became a Justice [...] <sup>141</sup> (Interview with Wu on 19-OCT-2004)

Apparently, the Judicial Yuan was not completely controlled by the dictators – even during the period of autocracy – offering it a great deal of space for pursuing judicial independence. In other words, while there is no doubt that the nationalist dictatorship

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<sup>140</sup> Constitution of R.O.C. § 79II (1947) (Official Translation).

<sup>141</sup> Author's Translation.

(1928-1990) existed, the extent of the nationalists' political influence may be exaggerated. They did not fully control the ROC judiciary at least, in stark contrast to the communist control of modern Chinese judicial power.

### 3: METHODOLOGY: RECONSTRUCTING THE JUDICIAL YUAN THROUGH DATA AND ARCHIVES

#### **3.1 INTRODUCTION**

This thesis seeks to produce new understandings of the Judicial Yuan through a combination of methodological tools and theoretical models that have not been previously applied to the study of courts in Taiwan. In terms of methods, systematic attention to court data and case-coding opens up new ways of analysing constitutional judicial review; meanwhile, interviews with the Justices of the Judicial Yuan provide fresh and original insights into the judicial decision-making process – in particular, the discovery of the Judicial Yuan’s official interview series.

Concepts of judicial assertiveness (Kapiszewski, 2007: 213-220) and deference (ibid: 236-237) are often applied to model a court’s decision-making patterns. Ginsburg’s model only takes account of judicial assertiveness, and can therefore only explain why politicians began to support judicial power (Finkel, 2008: 1-19; Tridimas, 2009: 1-24). It fails to explain why the court sometimes defers, and which policies will be pursued or not pursued. Ginsburg’s insurance model of judicial review (Ginsburg, 2003: 25) thus ignores the question of why the Judicial Yuan would come out in favour of certain ideas (such as the dissolution of congress or deference on capital punishment). The model fails to account for public opinion as a core judicial audience (Baum, 2006: 60-72) and thus ignores its strength and relevance.

In contrast to Ginsburg, this thesis constructs a modified strategic model that embraces multiple judicial audiences, allowing it to analyse how influential public opinion has

become in Taiwan in a situation in which the Judicial Yuan knows it has little fear from retaliation by the executive and the legislature. Public opinion supports judicial assertiveness, so when the court defers to strong public opinion and public preferences, we observe that public opinion is where the Justices' attention is mainly concentrated.

### **3.2 GENERAL METHODOLOGY: SINGLE HISTORICAL CASE STUDY**

The general framework of this thesis can be described as a single historical case study, as defined by Dietrich Rueschemeyer (2003: 305-336), covering Taiwan's judicial power expansion from 1990 to 1999. The purpose of the study framework is to construct a model of judicial power expansion of the Judicial Yuan as a sequence of events, illustrating a pattern of strategic decision-making based on the interaction between the Justices and public opinion. Whilst the singularity of the object of study – the Judicial Yuan – ties this thesis together, it is of course possible to view the time period 1990 to 1999 in two different but complimentary ways. It can be considered as a series of individual case studies, with each case providing a piece of evidence supporting the key arguments of the thesis, or as a connected sequence of events, with each event constituting a case study in itself, tied together through a feedback mechanism or path dependency in which each event impacts upon the next. The level of diffuse public support for the court as institution links the singularities into a chain via longitudinal analysis offering a more holistic view of individual cases and causality.

The time period of research from 1990 to 1999 is defined according to specific milestones. On 21 June 1990 the Judicial Yuan held *Judicial Yuan Interpretation No.261* [1990], in which the Justices dismissed the authoritarian ROC congress and called a

constituted assembly for democratisation; on 24 March 2000<sup>142</sup> it successfully obtained the ultimate judicial power in *Judicial Yuan Interpretation No.499* [2000], where the Justices struck down the Additional Articles of the Constitution 1999. This thesis will therefore study the Judicial Yuan's decisions between 1990 and 1999, from *Judicial Yuan Interpretation No.250* [1990] to *Judicial Yuan Interpretation No.498* [1999] (249 cases in total<sup>143</sup>). As diffuse support and legitimacy gradually increases throughout the decade, each judicial intervention builds upon the previous one as the Justices come to rely on growing public support and judicial review as mutually reinforcing variables until they finally obtain the ultimate power via *Judicial Yuan Interpretation No.499* [2000].

### **3.3 GENERAL METHODOLOGY: INTERDISCIPLINARY ANALYSIS**

Ginsburg considered judicialisation (Sweet, 2000: 1-30) over a period of time, arguing that political fragmentation opens up political opportunities for judicial power (Ginsburg, 2003: 251-252). The key weakness of Ginsburg's fragmentation thesis is not its assumption of strategy or power-maximisation, but its unclear understanding of Sinology (morality, philosophy, legal custom and sense of justice), upon which the Taiwanese judicial ideal is constructed. In other words, Ginsburg's study on Taiwan fails to explain<sup>144</sup> why Taiwan's Justices changed their minds and their behaviour 'all

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<sup>142</sup> Although the case was promulgated as the Judicial Yuan's first case of the year 2000, it was appealed on 28 October 1999.

<sup>143</sup> I consider *Judicial Yuan Interpretation No.499* [2000] as the outcome of Taiwan's judiciary-public opinion alliance, so it does not count statistically.

<sup>144</sup> For example, Ginsburg says that 'the appointment mechanisms similarly reflect the prospective position of political parties in the political system. The most dominant party in our three cases, the KMT (i.e. the Nationalist Party), reserved to the president all appointments to the Council of Grand Justices, allowing much tighter control of the membership of the constitutional court' (Ginsburg, 2003: 250). But only a few pages later, he states that 'the Council of Grand Justices on Taiwan has rendered a number of politically important decisions supporting the liberalization of the political system, most notably Interpretation No.261 forcing the retirement of the "old thieves" from active political life' (ibid: 253-254) – Ginsburg fails to explain why the Justices appointed by the Nationalist Party suddenly

of a sudden' (ibid: 106) in the 1990s. Ginsburg addresses crucial cases such as *Judicial Yuan Interpretation No.261* [1990] under the vague and all-encompassing umbrella of 'Confucian constitutionalism' (ibid: 106-157). However, Ginsburg is right in one sense – Taiwan's judicial ideal – and this thesis will, at least from this viewpoint, stand at Ginsburg's shoulder, applying new interdisciplinary approaches to find out why and how the Judicial Yuan changed from a court that 'served an authoritarian regime' to 'an instrument for democracy and human rights' (ibid: 106).

Scholars recognise that judicialisation is a worldwide trend; however, it is considered a consequence rather than an ambition because no judiciary has yet come to occupy a crucial political role (Landfried, 1994: 113) by following the worldwide trend of judicialisation. In other words, we need to seek out genuine political grounds for judicialisation on a country by country basis. In terms of Taiwan, Ginsburg was only aware of the importance of culture, but this thesis takes matters further to explore how Taiwan's culture (including its morality, philosophy, legal customs and sense of justice) influences judges by analysing not only judicial activism but also its passivism.<sup>145</sup> In Taiwan's case, this thesis can build an even more persuasive model<sup>146</sup> to identify the genuine political grounds and the sources of Taiwan's judicialisation in accordance with Baum's idea of judicial audience (Baum, 2006: 25-49).

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changed their mind/behaviour. Even if we all agree with Ginsburg that the Justices were not anti-nationalists (ibid: 254), he still fails to explain why they suddenly chose to 'assert their authority' (Kapiszewski, 2007: 213-220) instead of deferring (ibid: 236-237) to the authoritarian government.

<sup>145</sup> Deciding not to decide in political cases (judicial passivism) is the strongest form of judicial deference, and we discover that the Justices only deferred to public opinion during the 1990s – this cannot be explained by Ginsburg's model.

<sup>146</sup> There are patterns and degrees of judicial assertiveness (Kapiszewski, 2007: 213-220) and deference (ibid: 236-237). I will attempt to explain these patterns and degrees by looking at the different audiences the Judicial Yuan faced in the 1990s. The government and the congress were audiences that the Judicial Yuan met with assertiveness – the Justices were not scared of retaliation after democratisation. However, the Justices always deferred to public opinion (not a case being found that goes against it), which represents a clear boundary for judicial decision-making.

In Taiwan, it is not just that some cases were more assertive (Kapiszewski, 2007: 213-220) than others in terms of separation of power games, it is about judicial audience and what it means to our understanding to assertiveness. A case may be radically powerful in terms of dismissing the congress, but at the same time defer to strong public opinion against the congress. In other words, we must study the relationship between Judicial Yuan and the public in order to fully understand judicial decision-making, because we need more variables and analytical dimensions than Ginsburg used. Understanding the fragmentation of congress is a necessary prerequisite to understanding judicial power expansion because it is that fragmentation which opens up opportunities for judicial decision-making and reduces the risk of retaliation. However, it is not sufficient just to understand judicial decision-making, so we must add public opinion to the mix, as well as the judicial strategy of building public support. Hence, this thesis adopts a series of ‘but for’ causations to examine the relationship between Judicial Yuan and public opinion:

1. If there was no political fragmentation through democratisation (Ginsburg, 2003: 251-252), the political space for judicial power expansion would not have opened up<sup>147</sup> (*see also* Chapter 6).
2. If there was no strong public support (Hoekstra, 2003: 12-15) for the Judicial Yuan, the Justices would not have used the opportunity<sup>148</sup> for judicial power expansion in a different way (*see also* Chapter 7).

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<sup>147</sup> I would specially cite Nigel N.T. Li, who holds that the Judicial Yuan’s greatest reward for *Judicial Yuan Interpretation No.261* [1990] is to surprise the whole nation into realising that the Justices can be very important in politics (Interview with Li on 17-JUN-2013). Moreover, Li believes that the Justices learned how to be strategic from this case (*ibid*).

<sup>148</sup> Although this impression is based on my teenage memory, the Justices in the 1990s (unlike the Justices nowadays) were unbelievably authoritative in politics – no political controversy remained

3. If the Justices had never considered public opinion as a political source for judicial power expansion, they would not have had to educate the public on higher fundamental rights standards<sup>149</sup> (*see also* Chapter 8).
4. If the Justices had never considered public opinion as their primary<sup>150</sup> judicial audience (Baum, 2006: 25-49), they would not have to avoid strategically angering the public (*see also* Chapter 9).

### **3.4 GENERAL METHODOLOGY: AMENDED DOCTRINAL ANALYSIS**

The case studies used in this thesis illustrate that neither the constitutional text of 1947 – which has remained stable even though judicial interpretation has changed dramatically over time – nor the intervention of other branches in the separation-of-powers model can successfully stand in the way of the power expansion of the Judicial Yuan. On the contrary, in terms of abstract constitutional language, Taiwan’s constitutional design emboldens, or at least acquiesces to the Justices in judicial power expansion. There is no formula in the constitutional text<sup>151</sup> that encourages the Justices

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debatable after the Chief Justice’s gavel fell: Newspapers reported what the Justices had decided and the whole nation was pacified. Moreover, their political decisions are still massively cited as Taiwan’s public law standard at the present – it is not an overstatement to say that they established Taiwan’s rule of law and constitutional politics.

<sup>149</sup> In realistic terms, how can a judiciary obtain nothing by telling the public that they deserve to have something better than they were anticipating? How can we simplify the Justices’ motives to the ordinary when they choose to alter people’s minds using double-rewards?

<sup>150</sup> In my opinion, if a situation arises in which a large majority of Taiwanese citizens supports the abolition of the capital punishment, or in a situation in which the PRC suddenly disappears, both the *Judicial Yuan Interpretation No.328* [1993] and *Judicial Yuan Interpretation No.476* [1999] will be overridden.

<sup>151</sup> Such as Henkin, who challenged the political question doctrine (Henkin, 1976: 597-625). There is a gap between limitations (Stennis, 1958: 1179-1181) and self-imposed limits (Neubaver and Meinhold, 2010: 441-472) on judicial power.



to be assertive in some cases and opt for deference in others. Similarly, even if Montesquieu (Singer, 2009: 97-112) thought of judges as the *bouche de la loi*, the idea of separating, balancing or competing branches of government – including the judiciary – implies the assumption that each branch aims to maximise its own power. Such a separation of powers model of judicialisation thus helps us understand when one branch becomes more powerful than another branch in terms of who has the last word and why. However, it is much harder to explain why, in an identical separation of powers game with a fragmented legislature and a weak executive, judges sometimes choose assertion and sometimes opt for deference. We thus need to bring in other variables (topics, audiences, public support) if we want to understand variations in judicial power expansion case by case – Ginsburg’s model, in other words, cannot explain the examples of judicial deference that we find in the 1990s.

As a matter of fact, no limitation to judicial power regarding the political question doctrine is embodied in the Constitution; all we read there is that political controversies shall be controlled by the Judicial Yuan.<sup>152</sup> Using legal doctrinal analysis alone, we cannot explain why the Justices sometimes opt for deference unless we take public opinion into account. Because the Judicial Yuan paid so much attention to public opinion, strong public preferences became a boundary the Justices dared not cross, and this constituted a limitation to judicial power expansion. In other words, this thesis reviews Taiwan’s judicial power expansion using the judicial audience theory (Baum, 2006: 25-49) as its main doctrinal amendment.

### **3.5 SPECIFIC METHODOLOGY**

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<sup>152</sup> Constitution of R.O.C. § 171II (1947).

Case-coding is a common quantitative method<sup>153</sup> used to measure and analyse judicial behaviour. Case-coding plays a particularly useful role in the study of Taiwan's judicial power expansion because it provides us with a data-set that not only illustrates the frequency of judicial decisions but also many other variables for the time period between 1990 and 1999. We can code each of the 249 cases, from *Judicial Yuan Interpretation No.250* [1990] to *Judicial Yuan Interpretation No.498* [1999], according to type (*see also* Chapter 7), judicial opinion (*see also* Chapter 5), nature (*see also* Chapter 8), bench size (*see also* Chapter 5), the name of the appellant (*see also* Chapter 5), which branch of government (the executive or the legislature) was declared to have acted unconstitutionally (*see also* Chapter 7), and the frequency of declarations of unconstitutionality (*see also* Chapters 5, 7 and 8). This allows us to search for correlation between judicial decisions and public opinion. It is important to stress that the quantitative sections of this thesis are not aimed at empirical proof of causality. Correlation is not causality, and the coding only provides us with new ways of identifying patterns and trends. As a second step, qualitative narratives based on interviews, archival work and secondary sources establish a qualitative dimension of evidence that supports the key argument of the thesis in terms of causal relationships between public opinion and judicial behaviour.

The qualitative approach of this thesis takes its empirical rationale from the well-established presence of judge-made law in modern constitutional democracies.<sup>154</sup> This

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<sup>153</sup> In terms of national statistics, Taiwan is ranked as the world's number one open-data country by the Open Knowledge Foundation in 2015 (Merit Times: Merit Times 10 December 2015). As a result, all figures and tables in this thesis, unless mentioned otherwise, have been compiled on the basis of official data via the use of the National Central Library (Chinese linguistic competence is required). The case-coding and resulting datasets have been developed by the author from scratch, and related figures and tables are thus labelled as 'compiled by the author'.

<sup>154</sup> There were 32 Justices in the 1990s, but not all of them were equal in importance. In 2012, when I

is acknowledged by the judges themselves (Barak, 2006: 155-158) as well as theorists using civil law (Kelsen, 1945: 150-153) at different points of time and for different countries. Such recognition of judge-made law *ad hoc* verifies the pivotal role of judges' subjective opinions – both jurisprudential and value-based – in judicial decision-making, including unconscious biases. The 18 interviews<sup>155</sup> conducted with 17 Taiwanese Justices who served on the bench between 1990 and 1999 therefore constitute an empirical examination of the Justices' subjective awareness of 'non-constitutional' elements as well as strategic positioning in their decision-making. The interviews enable this thesis to present the Justices' own explanations in order to assess the substantiality of the role of various audiences and the extent to which Justices' make strategic decisions in the light of the reactions expected from these audiences. Because the Judicial Yuan is the only state organ empowered to make *per incuriam* constitutional judicial decisions, there is no better way to explore judicial decision-making in Taiwan than by interviewing the Justices in order to gain insights into their personal values and motivations.

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began this research, all had retired and 5 were now deceased. This thesis is based on 17 interviews with former justices including Justices Yang Yu-Ling, Herbert Han-Pao Ma, Wu Geng, Shih Shen-An, Chen Rui-Tang, Chang Cheng-Tao, Chang Teh-Sheng, Lin Kuo-Hsien, Vincent Sze, Sun Sen-Yen, Chen Chi-Nan, Tseng Hua-Sun, Tung Hsiang-Fei, Yang Huey-Ing, Tai Tong-Schung, Su Jyun-Hsiung and Hwang Yueh-Chin. The thesis often cites the interview of Nigel N.T. Li, who is not only one of the core draftsmen of the Additional Articles of the Constitution but also the best-known lawyer in the field of constitutional judicial review. He is also one of Taiwan's most authoritative professors in constitutional law. In other words, Li is the most important participant in amending the Constitution, teaching constitutional law and filing constitutional litigations.

<sup>155</sup> All the interviews took place in Taipei, during the fieldwork period for this thesis, from May 2013 to September 2013, along with heavy archival studies in the National Central Library. Because most of the interviewees answered the questions by guiding me to read his/her writings and official interviews. My understanding is that they are more comfortable to provide information with careful consideration, so that they prefer archives – it does not mean that they were unwilling to answer my questions, but most of them wanted me to cite in accordance with archives. They told stories, but they wanted these stories to be cited in accordance with their writings, biographies and official interviews. Here I cite Justice Ma's personal exhort that influences me deeply: 'I want you to review the proportionality principle, David. Do everything by minimum means as long as it works. It does not mean you are afraid of them, but it is worthless to waste your time on them because your energy is limited. Please use your energy for our country and do not waste it on unnecessary political means'.

As explained previously, the interview project turned into a prolonged archival study in the National Central Library for two reasons. Justice Herbert H.P. Ma kindly offered me a copy of an official interview conducted by the Judicial Yuan in 2003, along with his books and writings, guiding me to read and cite his opinions extensively. It was not until this point that I realised that the Judicial Yuan had conducted an interview project on retired Justices and judges – even Nigel N.T. Li had not heard about this project until I told him about it. But Justice Ma was not the only one who asked me to search the archives for previous interviews; all the Justices interviewed provided me with their interviews, as well as their books and writings. Moreover, it was suggested that I wrote about them in accordance with their archives, books and writings. They were more comfortable about providing information after careful consideration, so they prefer archival material over face-to-face interviews. In Taiwan, there is a cultural tradition that judicial elites prefer to state their professional opinions through their writing, memoirs or newspaper editorials; This meant that the published archives are just as important as my interviews with the retired Justices.

### **3.5.1 Subjective Judicial Bias and Preferred Position**

It is an open secret amongst constitutional lawyers worldwide that judges have preferences outside the realm of formal judicial decision-making (Williams, 2011: 168). Segal and Spaeth (1993: 390) have built an entire sub-field of scholarship around this insight, and the attitudinal model is also relevant for the US Supreme Court insofar as Justices can vote for their preferences sincerely. In other words, the nine US Supreme Court Justices do not have to be strategic. However, this thesis does not follow the attitudinal model; instead it maintains the distinction between judicial attitude (preference) and actual decisions mediated by strategic considerations. As such, the

interviews and the study of archival sources had a different objective and did not follow an attitudinal-based model. Segal and Spaeth attempted to identify the actual political values of a judge, then modelled judicial behaviour on the basis of such values, whereas this thesis searches for evidence – through interviews as well as the Judicial Yuan autobiographies archive – that illustrate the audiences Justices are thinking of when they make their decisions, and whether Justices make decisions strategically. In other words, do Justices think about how their audiences will react, and do their expectations of such reactions form part of the judicial decision-making process?

As Odendahl and Shaw (2001: 300) contend, personal interviews represent ‘an effective method of data collection for research on elite subjects and culture’. This thesis on Taiwan’s Judicial Yuan treats Justices as elite subjects by using such interviews, and explores the Judicial Yuan’s culture and organisation of its decision-making. My interviews with the retired Justices provided me with an opportunity to analyse their preferences, their awareness of bias, their understanding of the judicial decision-making process, their ideals of what makes a good judge and thus their general view of the role the Judicial Yuan should play. The compilation of narratives through interviewing former Justices of the Judicial Yuan supports the theoretical framework chosen for this thesis<sup>156</sup> and verifies the key arguments presented. For example, in 1992 Dr Shih Chi-Yang<sup>157</sup> said ‘Public opinion is like gurgling water [that I must comply when it

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<sup>156</sup> Justice Su Jyun-Hsiung’s recall of *Judicial Yuan Interpretation No. 499* [2000] reveals that formalism is not dominant. He said that the National Assembly stressed the fact that they were supreme because they were empowered to amend the Constitution (Interview with Su in NOV-2009). Su’s interview is formal in this section, but we can still infer that he intended to tell us that the National Assembly considered the Judicial Yuan passive because of its formalism (ibid). However, Su said that Justice Wu Geng argued that the decision of the National Assembly was unconstitutional *per se*, after which all the Justices agreed that the National Assembly must be checked with judicial activism (ibid).

<sup>157</sup> Dr Shih Chi-Yang was the Head of the Judicial Yuan, and publicly warned the Nationalist Party that public opinion in Taiwan was too powerful to disobey. He cautioned the nationalists against an indirect presidential election in 1992, finally resulting in Taiwan’s direct presidential election in 1996.

changes].’<sup>158</sup>

### **3.5.2 An Unexpected Discovery: The Importance of Archival Studies and The Judicial Yuan’s Oral History Project**

Fieldwork for the interview project began between May and September 2013. Because of administrative traditions and the exceptional bureaucratic capacity of the ROC, the Judicial Yuan compiled extensive statistical data for the ROC Government. It would be no exaggeration to say that ROC officials collected most of the country’s first-hand data, filing them in national libraries in readiness for academic analysis. However, they remain mainly unused by either law or political science.<sup>159</sup>

Since 2002, the Judicial Yuan has even embarked upon a series of oral history projects,<sup>160</sup> which involve interviewing senior Justices and judges of the ROC. These official interviews were published<sup>161</sup> in 2004 (Book 1), 2006 (Book 2), 2007 (Book 3), 2008 (Book 4), 2010 (Book 5), 2011 (Book 6) and 2013 (Book 7). The contents of these books inspired this thesis to shift the focus of its approach<sup>162</sup> from a pure interview

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<sup>158</sup> Author’s Translation.

<sup>159</sup> Taking Ginsburg as an example, no official data were used either in his book or in his original S.J.D. thesis on which his book is based. It is probably reasonable to assume that Ginsburg was not aware of the official data, because, as mentioned earlier, even Nigel N.T. Li did not know until I told him. One of the reasons for Ginsburg’s omission of official data is, I assume, due to the Chinese linguistic habitus – the Chinese language prefers abstract descriptions, which can create difficulties in terms of library cataloguing. For example, a great deal of unrelated statistics is embodied in a book called the ‘Taiwan Statistical Data Book’ and it takes a great deal of time to discover statistics relevant to research topics.

<sup>160</sup> According to the project director, Wang Tay-Sheng, the project was proposed by the Institute of Modern History of the Academia Sinica (ROC Judicial Yuan, 2004: Preface) and conducted by the Judicial Yuan in order to record how senior Justices and judges strove towards judicial independence in Taiwan (ibid) – the interviewees were chosen by the Judicial Yuan (ibid).

<sup>161</sup> The Judicial Yuan, as the publisher, has titled these interviews ‘Oral Histories Told by Elder Judges and Justices in Taiwan’. Theoretically we can purchase these publications, but this is problematic because Taiwan’s governmental publications are not published for commercial purpose and the ROC Government has no budget whatsoever for advertising, so researchers find themselves not knowing if information exists or where to look for it if it does.

<sup>162</sup> The Judicial Yuan’s oral history project has continued for 15 years (since 2002) and 38 interviews were conducted in the 12 years between 2002 and 2013) – at a rate of 3.79 months per interview. Most

approach to a much stronger focus on archival studies.

During the first set of key interviews, the following pattern emerged: Justices provided information during these interviews, but advised me to consult the oral history project firstly because it revealed a more substantial amount of information and secondly because the official interviews took place closer in time to the cases themselves, at a time when the Justices' memories of the cases was fresher.<sup>163</sup> When I came to edit the interviews I had compiled, I realised that the information the Justices had provided in their interviews required massive supplementation from archival studies, including judges' official interviews, writings, books and memoirs, because all of these had been produced by the Justices themselves, which made pronounced improvements in clarity.<sup>164</sup> In other words, I was advised by the Justices to shift my focus to the archives. Some of them even provided me with those archives, and they all pointed me towards the official interviews conducted by the Judicial Yuan.

In a nutshell, the discovery of the judicial biography project interrupted – in a positive way – the flow of the original plan for my research, partly because the Justices

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interviews include judges' personal opinions on specific cases and all the crucial cases from the 1990s are covered by the Justices interviewed. In other words, this oral history project is like gold dust to researchers, but no one uses it in the field of constitutional law as far as I know because legal-historical study is not popular in Taiwan. For example, Justice Ma was a little surprised when he heard that I wanted to interview him, and told me that almost nobody from my generation would listen to his stories. He sighed for the loss of wisdom in judicial politics.

<sup>163</sup> Most of the 1990s Justices were born in the 1920s or 1930s and they all told me that I would have to undertake archival studies to make sure their memory is chronologically correct. This meant that I had to rely on the official interviews with the Justices conducted by the Judicial Yuan, because these interviews were double-checked by the Institute of Modern History of the Academia Sinica in terms of time and accuracy. There are 270 pages in Book 1 of the Oral Histories Told by Elder Judges and Justices, 273 in Book 2, 284 in Book 3, 236 in Book 4, 419 in Book 5, 358 in Book 6 and 201 in Book 7 (2041 pages in total).

<sup>164</sup> The official interviews provided the Justices at least one or two years to reconsider their words before publication. This means they have more time to consider what they are going to publish, including their writings and books. Eventually they will disclose more – which was precisely the case in the Judicial Yuan's oral history project, in which the Justices gave out carefully worded information. I sensed that the Justices I interviewed were trying to tell me this: why not rely on the archives first, since I have already published my carefully-worded opinions?

themselves, during my first interviews with them, recommended that I consult the oral history project for more detailed information; this seemed logical, as the official oral history interviews took place much closer to each Justice's actual experience on the bench,<sup>165</sup> whereas the interviews conducted for this thesis took place about 16 to 26 years after the cases were decided. Nevertheless, the comparatively brief series of interviews conducted for this thesis still provides a number of important insights – the delay in time can also be a strength, as the most prominent memories of Justices have come to the forefront more clearly. For instance, all the Justices I interviewed in 2013 made strong comments about the collective honour of the Justices as a court,<sup>166</sup> and did not want to consider the possibility of discussing any Justice's individual behaviour<sup>167</sup> within the Judicial Yuan:

Regarding *Judicial Yuan Interpretation No.499* [2000], the Representatives of the National Assembly lodged an accusation in the form of an impeachment against me in the Control Yuan; [however], all of the Justices stood as one, responding to the Control Yuan by asking why this accusation concerned only one Justice. The Council of Justices is based on the collegiate system; hence it must be the Judicial Yuan's joint decision when any decision is made.<sup>168</sup> (Interview with Wu on 19-OCT-2004)

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<sup>165</sup> For a list of all interviews undertaken by the oral history project and their respective dates, see *generally* pages 31-32 in detail.

<sup>166</sup> Justice Lin Tzu-Yi, an expert in the field of freedom of speech, told me in his interview that in his opinion a retired Justice in Taiwan should have limited freedom of speech because this is good for the present Justices. Justice Lin Tzu-Yi stuck to his principles after retirement, and avoids writing critical comments because he believes that the collective honour of the current Justices is crucial to the Judicial Yuan.

<sup>167</sup> Take Justice Herbert H.P. Ma as an example. One of his typical responses was: 'It was a long time ago and I do not remember. However, this is just irrelevant gossip'.

<sup>168</sup> Author's Translation.



Such insights reinforced the fundamental methodological and theoretical choices of this thesis, such as the concept of the Judicial Yuan as a composite institutional actor *per se* (Goetz, 2003: 68) and the corresponding decision to ignore where possible the formation of coalitions on the bench (Baum, 2006: 50-60) as well as all other aspects of intra-institutional politics and hierarchies. The absence of specific types of information<sup>169</sup> can thus reveal almost as much about the character of a judicial institution as the information that is available. For the US Supreme Court, for example, we learnt a lot about the internal workings of the institution from its clerks (Peppers and Zorn, 2008: 51-77), investigative journalists (Woodward and Armstrong, 2005: 1-592) and some judicial autobiographies. For Taiwan, the internal institutional system of the Judicial Yuan remains closed to outsiders, and Justices, journalists and most jurists do not consider the internal judicial politics as an important part of any academic study.<sup>170</sup> Similarly – and in contrast to the USA and many common law apex courts – the Judicial Yuan does not reveal which Justice wrote which judgement – neither the judgment itself nor any of the interviews or comments in newspapers reveal anything about judicial authorship. Chapter 5 of this thesis tries to confirm the widespread and plausible assumption amongst Taiwanese lawyers and jurists that not all Justices were equally important in the 1990s (*see generally* the statistics on pages 197-219). Even if this was true, and only 4 or 5 out of 15 Justices (or their legal preferences) shaped the Judicial Yuan in the 1990s, none of the Justices would ever confirm this in any

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<sup>169</sup> In the personal interviews, all Justices directly refused (if asked) to answer questions about ‘internal affairs’; nothing related to ‘internal affairs’ is mentioned in the judicial biography project, either because Justices were asked directly and refused to answer or because such topics were indirectly avoided to begin with.

<sup>170</sup> In the personal interviews, questions leading in this direction would immediately be dismissed as gossip – of course, some US scholars, such as Noah Feldman in his book *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices* (Feldman, 2010: 1-528) have illustrated how insightful internal judicial politics can be. Either way, it matters little to this thesis, or to Taiwan in general, as it seems impossible to penetrate the institutional silence.

interview.<sup>171</sup>

To summarise, this thesis provides fresh and original empirical evidence through the analysis of 43 interviews with Taiwan's Justices and judges, along with 4<sup>172</sup> interviews with a politician (Hsu Hsin-Liang), two constitutional lawyers (Lin Chih-Chung and Nigel N.T. Li) and a journalist (Wang Wen-Ling). The 50 interviews can be divided into 12 personal interviews at the beginning of the first period of fieldwork and the archival work in the Judicial Yuan, locating and analysing 38 interviews from the 'official' interview series carried out by the judicial biography project. During the first phase of interviewing in Taiwan, many of the Justices interviewed stated at some point during the interview that the questions I was asking had already been covered extensively during official interviews for the judicial biography project. Step by step, it became clear that the archives of the Judicial Yuan not only held an extremely significant resource in terms of its discovery for a PhD project, but also because the official interviews were exceptionally information-rich and detailed. My evolving research strategy then came to focus mostly on the identification and analysis of the judicial

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<sup>171</sup> The prestige of a judicial giant here rests more on the Justice's capacity to protect the reputation of his colleagues as equals than the claim to authorship of a judicial opinion. Chief Justice Weng Yueh-Sheng (Interviewed in NOV-2009) and Justice Herbert H.P. Ma (Interviewed on 19-JUL-2013) expressed any particular concern about judicial reputation by holding that the Judicial Yuan should be considered as a single entity, and they do not believe that the public sight of a divided Judicial Yuan would do the institution any favours. In my opinion, this again relates to Taiwan's judicial culture – no Justice can be exempted from political accountability because they made decisions together, and any challenge against one Justice will be deemed a challenge against the Judicial Yuan as an entity (Interview with Wu on 19-OCT-2004).

<sup>172</sup> Chairman Hsu Hsin-Liang's interview was the first I conducted, because he was the leader of the Democrats at the time of democratisation. I sought to know what happened and what the role of the Judicial Yuan was in democratisation from the leader of the opposition party. I also interviewed another important politician from the Democrats, Chairman Wu Jan-Fu, for the same reasons, but Chairman Wu's interview was too political – he simply wanted to let me know how evil the Nationalist Party was. Nigel N.T. Li's interview was conducted because he is the most important person in this thesis other than the Justices themselves. Chairman Lin Chih-Chung's interview was conducted later because he was not only the lawyer who defended former President Chen Shui-Bian in courts, but was also one of the first judges who allied themselves with public opinion for judicial independence in Taiwan's history. Journalist Wang Wen-Ling's interview was the last interview I conducted because I was looking for a law journalist like Noah Feldman to profile the image of the judiciary-public opinion alliance.

biography archive; whenever it was difficult to understand an aspect of an individual interview, when there were gaps in relation to the specific information required for this thesis, the Justices were consulted again. However, they recommended that I should put the judicial biography project first, and consider it as the most important resource. In a nutshell, it was neither necessary nor possible in terms of fieldwork time to undertake both archival work and a complete interview series. The key source of information about judicial decision-making and finding evidence to support the hypothesis of this research thus became the official archives, along with the memoirs and academic publications of the Justices.

### **3.5.3 Judicial Archives in Taiwan**

Anybody – whether Taiwanese citizens or foreign scholars visiting Taiwan – can access the judicial archives in national libraries throughout the country. The practice of Taiwanese government publication is that each department publishes respectively and places the publications in national libraries together, so anybody in the country can access the archives without going to a specific archive. However, the first problem we confront in Taiwan is that there are too many archives, and the Taiwanese filing system is generally speaking not systematic enough. We can easily become lost in archives and may not be aware of new archives published, such as the Judicial Yuan's biography project. Neither Nigel N.T. Li nor I knew of this project until the Justices interviewed provided me the examples.<sup>173</sup>

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<sup>173</sup> In my opinion, the Taiwanese bibliography is not systematic. Taking the Judicial Yuan's biography project as an example, it is online and can be accessed via the Judicial Yuan's database, as long as we know it exists. If we do not know, we will probably not accidentally stumble across it using a database search because of Taiwan's unsystematic bibliographic system.

Specific sections of Taiwan's judicial archives are not open to the public, although it is unclear why. Surprisingly, many of the Justices said they do not know why either. It is likely to be an obscure bureaucratic tradition that everyone follows without knowing the reason.<sup>174</sup> In the cases studied by this thesis, access to judicial biography interviews or case files was never problematic, but access was restricted to the minutes of the Justices' meetings filed in the Judicial Yuan (the Justices I interviewed contended that these minutes should be open because there is nothing to hide from the public). Even the minutes of the *Judicial Yuan Interpretation No.1* [1949] meeting are not accessible.<sup>175</sup> This 'bureaucratic tradition'<sup>176</sup> particularly regarding the model of this thesis is strategic, because no one in the world can read judicial decisions in accordance with the Justices' internal interaction unless these minutes are made available.<sup>177</sup> A possible prediction suggested by this thesis is that the Justices may have no intention to avoid talking about the cases, because while many Justices have spoken widely in official interviews, they intend not to disclose any information about intra-institutional politics.

Of the archives that are open, a good understanding of the coding system is needed in order to access the database. Even for a trained Taiwanese lawyer or an experienced jurist, the database is the opposite of user-friendly. There are no instructions or manuals,

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<sup>174</sup> Although I am forbidden from providing names, many Justices clearly told me that in their opinion these archives should be open to the public. However, when I asked them why they are not open, the common answer I received was: 'I don't know, it's just bureaucracy'.

<sup>175</sup> In Taiwan's legal education, minutes of judicial meetings are completely irrelevant because no judicial minutes have ever been open to the public. Hence, it is no exaggeration to say that most Taiwanese academics are not aware of the importance of these minutes.

<sup>176</sup> As mentioned previously, the importance of judicial minutes is commonly disregarded, but Justice Wu Geng has suggested at least once that they should be open to the public (Interview with Wu on 19-OCT-2004). However, his proposal was not considered, and we cannot know from his wording whether the proposal was deferred or rejected (ibid).

<sup>177</sup> Though I am not authorised to provide the name, a Justice I interviewed told me that the minutes remain traditionally confidential. He said that there is no reason to be confidential, but this is just the way things are.

and no glossary for abbreviations, and a lot of ‘research-time’ had to be invested in the deciphering of the Judicial Yuan’s case-labels, numeration and coding systems. However, the pay-off turned out to be a treasure chest of information, and the moment the catalogue of case-meeting-minutes is understood, it reveals an enormous amount of details<sup>178</sup> that can be accessed online.

The aforementioned case-coding system consists of one or two Chinese characters and case numbers in sequence. Each case is classified in accordance with the dominant subject matter: Chinese characters thus label the cases in terms of content-based taxonomy (as opposed to a procedural law-based taxonomy for instance). For example, the Chinese character *Shih* represents ‘constitutional interpretation’, so each case coded with this character is a constitutional judicial review case decided by the Judicial Yuan. In other words, the Chinese character shows not only the subject matter of the case but also the court jurisdiction; in this way each case can be found by a search for specific Chinese characters along with a number in sequence on the Judicial Yuan’s online database.

Such patterns of cataloguing and case-coding have a long history in China, and are rooted in the dense bureaucratic tradition of Chinese culture, impervious to change and renewal even when the database moves to the online realm. At the moment, access to the judicial database requires strong intuitive and linguistic skills, enabling the researcher to ‘guess’ which Chinese character is used for which courts and subject matter, or to ‘read’ the Chinese characters used in order to know what the case is about.

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<sup>178</sup> Judgement, judicial opinion, instrument of appeal, previous decision held by inferior court and administrative decision concerned (if available) are all included. We may even discover much additional information if we read scientifically, such as bench size and time taken for decision-making, which is something most Taiwanese academics usually ignore.

Once the system is understood, however, the identification of cases is waterproof, and the stories and legal processes proceeded are clearly displayed – except for any information regarding intra-institutional politics.

### **3.5.4 What is New and Original**

The research angle of this thesis itself is already new and original, because no academic in Taiwan has yet considered the exercise of judicial power through the lens of judicial politics. More precisely, no academic in Taiwan has yet systematically attempted to discover whether or not the Justices are influenced by public opinion. Lawyers and jurists in Taiwan murmur, but no one attempts to testify. In other words, this thesis is the first academic work that aims to understand why and how Taiwan's Justices made their decisions. Unlike most studies in Taiwan that only focus on the doctrinal analysis of these decisions, this thesis goes a step further, attempting to shape Taiwan's constitutionalism in accordance with its judicial politics.

Because there is not yet any trend to study the exercise of judicial power via judicial politics, official statistics and judicial archives have never previously been used for understanding judicial decision-making. For example, official statistics may be used to improve court services, but no one actually asks why the Judicial Yuan wants these improvements. According to Baum's judicial audience theory (Baum, 2006: 25-49) all human beings behave purposely, and if we apply that dictum to this thesis we may be able to provide an academic reasoning for these improvements. In addition, whilst Justices' signatures may be used only for formalities (although no one pays attention to them), this thesis transforms them into a new understanding of the exercise of judicial power. By counting signatures, this thesis successfully discloses the proper size of the

bench in each case, as well as providing a clear absence record for the Justices. The thesis also proves that all crucial cases in the 1990s were decided *en banc*.

The new and original approach of this thesis is thus illuminated; its main fieldwork contribution is to collect statistics and archives that were not collected for judicial politics through linguistic and academic skills, sieving out relevant information from irrelevant documents, thus sketching out an image of Taiwan's judiciary-public opinion alliance – an alliance which is discussed but never publicly admitted.

### **3.6 SINOLOGY AND TRANSLATION**

Almost all the translations within this thesis are labelled 'author's translation' – if government translations are available (for the Constitution and most importantly for the decisions of the Judicial Yuan) these are identified via a list of primary sources (official sources by the Government of the ROC in English).

For studies dealing with the ROC, this thesis does not apply the Hanyu Pinyin system promoted by the PRC because the ROC, and in particular its government institutions and courts, does not fully apply the Hanyu Pinyin system. Personal names are always Romanised in the way an author or judge chooses to Romanise his or her own name when publishing in a European language, attending a European Conference or teaching at a Western institution.

If the romanisation of a particular Chinese name is not found, the rule of romanisation within this thesis is as follows:

1. If he or she is a famous person in the West who already has a commonly Romanised name, this thesis adopts this name.
2. If he or she is a Chinese person who is not famous in the West, this thesis uses the Hanyu Pinyin system.
3. If he or she is or was a citizen of the ROC, this thesis uses the Wade-Giles system.
4. If he or she is or was a citizen of the PRC, this thesis uses the Hanyu Pinyin system.

It is worth noting that it is extremely impudent within the traditional Chinese culture to misspell a person's name. For instance, using the Hanyu Pinyin system to spell out the name of an ROC citizen can sometimes amount to a slight against this person's character.

### **3.7 CONCLUSION**

This thesis uses a data-heavy approach to study judicial decision-making of the Judicial Yuan, applying case-coding and statistical methods to narrate and analyse the history of the court throughout the 1990s. Although the ROC Government provides rich official statistics and archives, they are not collected just to help decipher judicial decision-making. Official statistics and archives are trawled from massive official datasets by



this thesis and compiled to support a theoretically sophisticated argument.

Instead of just reading cases which other Taiwanese scholars have already considered previously, this thesis applies interview methods that allow the former Justices to talk about the cases, using a method that brings fresh knowledge about what really underpinned the decision-making process. Surprisingly, most of what is new and original was discovered in the National Central Library in Taipei, where I discovered first-hand the court's oral history project. No other scholar has used this treasury of information before – because they were unaware of its existence.

## 4: THEORISING JUDICIAL SUPREMACY: A TAIWANESE PERSPECTIVE

### 4.1 INTRODUCTION

The ROC Constitution is to some extent a creation of judicial power expansion – it is abstract in content and requires a huge amount of interpretation. Moreover, it stipulates that the Judicial Yuan is the exclusive and ultimate *interpreta auctoritate* of the Constitution with no written limits at all.<sup>179</sup> The Constitution is structured in accordance with its founding father's legal thoughts and ideals, and that founding father and draftsman, Carsun Chang, did not prefer a balanced separation of powers design. As a pioneer of judicial supremacy, he commented on the Constitution through a series of lectures in July 1946, stating:

[T]he jurisdiction of the [ROC] judiciary not only refers to adjudications between civilians and civilians, and between civilians and officials, but also includes the constitutional judicial review power against both congressional legislations and the President's administrative discretion. [Our] rule of law shall not be considered successful, ultimate or prefect until such a power is exercised as the so-called judicial supremacy.<sup>180</sup> –  
Carsun Chang (1946)

Even though the ROC Constitution of 1947 (enacted in 1946<sup>181</sup>) may be the world's

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<sup>179</sup> Compare Constitution of R.O.C. § 78 (1947), with Constitution of R.O.C. § 78 (1947), and Constitution of R.O.C. § 173 (1947).

<sup>180</sup> Author's Translation.

<sup>181</sup> The ROC Constitution of 1947 was enacted on 25 December 1946, promulgated on 1 January 1947 and implemented on 25 December 1947.

first constitution based on judicial supremacy, we know with hindsight that Carsun Chang's constitutional designs, by authorising the Judicial Yuan with massive powers as well as concrete safeguards,<sup>182</sup> did not bring about judicial supremacy in the ROC. It seems that Carsun Chang attempted to motivate the Justices for judicial activism institutionally, and by giving them swords (constitutional powers) and shields (constitutional safeguards) together, the Judicial Yuan were expected to make decisions sincerely. In this respect it is reasonable to consider Carsun Chang as China's first legal academic who support the attitudinal model (Segal and Spaeth, 1993: 390) of judicial activism – although of course he was not aware of it.

The ROC Constitution embodies Carsun Chang's strong leanings towards judicial supremacy, but the practicality of such judicial supremacy relies on the Justices. If they could be easily threatened, the Justices might choose inaction and forgot about the massive judicial powers Carsun Chang was offering. In other words, it is crucial to know whether or not the Justices were fully protected from political intervention. As far as this issue is concerned, there is no doubt that Taiwan's political history between 1949 and 1990 (Roy, 2003: 76-182) becomes the best empirical evidence to prove that Carsun Chang's institutional shields (constitutional safeguards) were not sufficiently effective to protect the Justices in reality. Before they found an even more powerful shield – public opinion – the Justices were not capable of wielding Carsun Chang's institutional swords (constitutional powers) properly.

There is no doubt that the American academics are the pioneers of judicial behaviour studies, whilst Carsun Chang knew nothing about this subject. However, it is reasonable

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<sup>182</sup> Compare Constitution of R.O.C. § 80 (1947), with Constitution of R.O.C. § 81 (1947).

to conclude that he intended to found a constitution that provided political space for judicial decision makers to vote on the basis of their own policy preferences (Neubaver and Meinhold, 2010: 466). Since Pritchett and Murphy, who introduced concepts of judicial politics (Pritchett, 1948: 1-287) and strategies (Murphy, 1964: 3-212) respectively, the American idea of judges maximising policy preferences (Cross, 1998: 511-570) dominated the world's judicial behaviourism for decades. However, when we look at the Constitution, it is not difficult to discover that these American theories are exactly Carson Chang's fundamental principles. It was his intention to maximise judges' policy preferences, so that not only were the Justices the ultimate and exclusive constitutional interpreters, but they were given an unlimited scope for constitutional interpretation.<sup>183</sup> In other words, Carsun Chang had sensed in 1946 the theories that Pritchett and Murphy refined in 1948 and 1964.

Following Pritchett and Murphy, Schubert built the attitude activation model of judicial decision-making (Schubert, 1965: 22-43) and it is very interesting to discover how Carsun Chang's immature (yet understandable) idea of judicial decision-making falls in line with Schubert's arguably psychological and rational choice model (ibid: 10-13). According to Schubert, the Constitution expects the Justices to use their sweeping powers rationally so that no institutional limits need to be set. In other words, the Constitution infers Schubert's 1965 argument of psychological rationality, regardless of whether Carsun Chang personally knew anything about the sophisticated attitude activation model or not.

In the 1970s, Pritchett, Murphy and Schubert's contributions were largely absorbed into

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<sup>183</sup> Compare Constitution of R.O.C. § 78 (1947), with Constitution of R.O.C. § 78 (1947), and Constitution of R.O.C. § 173 (1947).

the attitudinal model built by Spaeth (Segal and Spaeth, 1993: 390). The attitudinal model dictates that ‘judges tend to vote according to their political preferences, attitudes, and ideologies’ (Weiden, 2011: 188), so this model supposes the judicial decision makers to be ‘policy makers, and they vote the way they do because they are interested in seeing their policy views made into law’ (Neubaver and Meinhold, 2010: 466). However, to some degree the attitudinal model only explains ‘why’ (motive) instead of ‘how’ (method) a judicial decision-maker makes such decision – would he/she vote at all costs? If the answer is no, the attitudinal model should be applied only to a limited extent, because judges may not always vote in accordance with their policy preferences in reality. Taiwan’s Judicial Yuan studies might therefore be an extremely good empirical example for attitudinal behaviourists.

As previously mentioned, Carsun Chang is a constitutional jurist whose thoughts may be categorised as attitudinal behaviourism. It should therefore come as no surprise that any political phenomenon the attitudinal model cannot explain in the judicial development of Taiwan goes beyond the original designs of the Constitution, although it may still be constitutional. The most remarkable political phenomenon in Taiwan’s judicial development is that the Justices under Carsun Chang’s Constitution did not exercise their extensive powers successfully until they were sure that public opinion was on their side (Baum, 2006: 25-49). This not only shows Carsun Chang’s failure to provide effective protection for the Justices (constitutional safeguards), but also indicates that public opinion is a crucial variable in terms of judicial decision-making in Taiwan. This phenomenon also implies that the Justices could no longer decide sincerely (attitudinal model) every time (Mishler and Sheehan, 1996: 169-198) because of this judiciary-public opinion alliance (Baum, 2006: 50-87). It meant that they had to decide strategically (Baum, 1997: 89-124) if necessary.

Ginsburg is the first academic to introduce the strategic model (Epstein and Knight, 1998: 138) to studies of Taiwan's Judicial Yuan. However, like Epstein and Knight (ibid), Ginsburg argued that the Justices' strategic decisions were all determined in response to the other branches of government (Ginsburg, 2003: 106-157). Ginsburg's study follows the typical American strategic model – the Justices were playing separation of powers games (Gillman, 1999: 84), and would always decide accordingly (Epstein and Knight, 2000: 625-653), but this model fails to explain why the Justices became extremely powerful – such as when they fearlessly struck down a constitutional amendment.<sup>184</sup> In other words, Ginsburg's model failed to explain where the political ground (Whittington, 2007: 161-229) of judicial supremacy in Taiwan actually lies – or more precisely, who provides such power to the Justices?

Ginsburg was completely unaware of the importance of Taiwan's judiciary-public opinion alliance. If public opinion is evaluated in accordance with Baum's judicial audience theory (Baum, 2006: 25-49), then the strategic model would be more appropriate as a lens through which to study Taiwan's Judicial Yuan. The Constitution is intentionally designed to permit judicial supremacy (Chang, 1947: Chapter 7), but the Justices' institutional protection (constitutional safeguards) against political intervention proved ineffective, meaning that Carsun Chang's original purpose of providing political space for sincere voting (the attitudinal model) was unsuccessful. It was the Justices themselves who found the political ground for judicial supremacy, and it is certain that the Justices had to pay for this somehow (the strategic model). As long as the judiciary-public opinion alliance remains in place, little space is left for sincere

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<sup>184</sup> E.g., *Judicial Yuan Interpretation No.499* [2000].

judicial decisions.

During the period of study (2012-2016), a review model was suggested by Epstein and Knight (2013: 11-27) because they came to see ideology as ‘just one of several forms of motivation that should be incorporated into a realistic and comprehensive conception of judicial decision-making’ (ibid: 24). Epstein and Knight’s new idea fits with this thesis because the so-called ideology or value may not be mirrored cross-culturally (i.e., Wen Tian-Xiang’s story in Chapter 1.5). Therefore, some modifications are required to this thesis.

1. Judicial self-interests should be defined in accordance with Chinese classical political thoughts and cultural or social biases.
2. The content and scope of political preferences may not be the same cross-culturally and thereby the Justices’ motives must be adjusted accordingly.

## **4.2 PUBLIC OPINION, MEDIA AND THE JUDICIAL YUAN**

In terms of whether the Justice of the Republic of China take public opinion seriously or not, [and] the question of whether [they] read public opinion or not, I think, speaking overall, it is nearly impossible for a jurist in the Republic of China, including Justices and judges, to completely ignore social reactions [...] <sup>185</sup> (Interview with Ma on 19-JUL-2013)

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<sup>185</sup> Author’s Translation.

As Justice Herbert Han-Pao Ma indicates, it is impossible to discount the influence of the public on judicial decision-making (Baum, 2006: 60-72) in Taiwan, though it is also hard to define specifically the scope of such influence – either as public preference (McGuire and Stimson, 2004: 1033) or as public opinion (Flemming and Wood, 1997: 468-495). Such difficulty is rooted in the ambiguity of public opinion – in particular, ‘what moves public opinion’ (Page et al., 1987: 23-43) and ‘what shapes public opinion’ (Heymann, 2000: 375).

Upon hearing my open-ended question about the meaning of public opinion, twelve of the staffers answered ‘the media’. Some of these men and women mentioned interest groups as well, but all believed that newspapers, television, or radio content was not simply a conduit for public opinion expression: In their view, it was the very essence of public opinion and can support or destroy legislative initiatives. (Herbst, 1998: 65)

At some moments we can detect what we believe are clear media effects. But very often the causal order of these relationships can be rather murky since the initial content of journalism does reflect the views and concerns of readers and audiences: In fact, if media content did not appeal to attitudinal currents already flowing through the social world, we would not find such texts attractive or relevant to our lives. It seems that non-systematic evidence supporting the conflation of media opinion and public opinion is everywhere [...] this is not to say that we must abandon the notion of media effects [...] yet the possibility of public



opinion/media conflation does present to us a tremendous challenge that can only help us understand the unique nature of contemporary American politics. (ibid)

This thesis has no intention of trying to analyse how public opinion is shaped in terms of the distinction between media and public opinion, because the core of this research centres on how judicial decision-makers were influenced by what Herbst refers to as a ‘public opinion/media conflation’ (ibid). Judges are like politicians – the distinction between media and public opinion may not be considered a necessity whilst making decisions, but the preference of public opinion and the media that ‘can support or destroy legislative initiatives’ (ibid) is always something that needs to be considered in political terms – unless they do not care about the political consequences. Moreover, judges can read public opinion through the media (ibid) as well as anyone else. Even though this public opinion represents a public opinion/media conflation, they are still capable of sensing public pressure as much as we are.

Judges have friends, family and neighbours as well as other people. They have the same exposure to public opinion as everyone else. We don’t live in an ivory tower. (Mackenzie, 2005: 141)

If we were to ask a British Member of Parliament how he read public opinion in the mid-19th century when the Representation of the People Act 1832 was being enacted, what would we expect him to say? As a politician, he would not read public opinion until the result of the election, because he wanted to win, but how could he read public opinion without public opinion polls? If we all agree that he was aware of public opinion through friends, newspapers or whispers in gentlemen’s clubs, there is no

reason why the same answers cannot apply to Taiwan's Justices in the 1990s.

Though they are not elected, judges read the same newspapers as members of Congress, and thus they, too, are aware of public opinion. [...] It is nonetheless true that the Court is sensitive to certain bodies of opinion, especially of those elites – liberal or conservative – to which its members happen to be attuned. The justices will keep in mind historical cases in which their predecessors, by blatantly disregarding public opinion, very nearly destroyed the legitimacy of the Court itself. (Wilson et al., 2015: 432)

Many interviews with and writings by the Justices in Taiwan show that they also read public opinion through media, and that their sense of public pressure attaches to China's classical concept of judicial responsibility to the common people. In other words, the judicial understanding of public opinion in Taiwan is a broad and unsophisticated sociological and philosophical idea, so that previous models of judicial self-presentation for the USA (Baum, 2006: 25-49), communication for Mexico (Staton, 2010: 53-64) and transparency for Germany (Vanberg, 2005: 19-60) require adjustment in order to comply with Taiwanese actuality:

Public opinion is like gurgling water [that I must comply when it changes].<sup>186</sup> – Shih Chi-Yang, Head of the Judicial Yuan (1992)

As mentioned previously, the Judicial Yuan actually decided what constituted public

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<sup>186</sup> Author's Translation.

opinion to the Justices in the 1990s according to the definition of public opinion provided by Hans Speier (Speier, 1950: 376), which means that the core of this research thus moves from how the Justices read public opinion through media to focus on what kind of *vox populi* would be considered public opinion by the Justices. In theory, the Justices had no constitutional obligation to listen to any voice of the people<sup>187</sup> but it was their choice to respond to it. They could apply the Universal Declaration of the Independence of Justice 1983 and tell the people that genuine judicial independence is to ‘avoid being influenced by any considerations other than those of ... justice’,<sup>188</sup> but as Ma (2013) said: ‘it is nearly impossible for a jurist of the Republic of China, including Justices and judges, to completely ignore social reactions<sup>189</sup>’ (Interview with Ma on 19-JUL-2013). In other words, it was their intention to read public opinion over and above their legal obligations<sup>190</sup>, which according to this thesis means how the Justices read public opinion is less important than understanding how the *vox populi* is considered public opinion by the Justices.

[Rulers who] have been honoured to be the parents of the people shall  
favour what people prefer and abhor what people dislike.<sup>191</sup> – The Great  
Learning of the Four Books (505-436BCE)

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<sup>187</sup> Cf. Universal Declaration of the Independence of Justice § 1.5 (1983).

<sup>188</sup> Id.

<sup>189</sup> Author’s Translation.

<sup>190</sup> Some may agree with Circuit Judge Thomas Gee of the US Court of Appeals that ‘the purpose of the judiciary is not to reflect public opinion in its deliberations or to satisfy public opinion with its decisions’. *League of United Latin American Citizens Council v. Clements*, 914 F.2d 620 (5th Cir. 1990). However, this opinion, as far as I am concerned, illustrates only the judges’ legal-constitutional responsibility rather than their political and moral responsibilities. There is no doubt that the Justices were not obliged to reflect public opinion legally and constitutionally, but there would be no chance for them to build up a Chinese ideal judiciary in Taiwan if they did not. *See generally* Max Weber’s moral attitude towards law, dogmatic jurisprudence and sociological understanding – ideal types (Krnoman, 1983: 7-14).

<sup>191</sup> Author’s Translation.

The Chinese concept of judicial responsibility to the common people originated in the historical debate between Chinese legalism and Confucianism (Head and Wang, 2005: 49-50), and ended up with a doctrine of ‘Confucianism prevailing’ (Huang, 1997: 488-489) in 134 BCE – a doctrine<sup>192</sup> born to remedy excessive legalism because the Chinese people were historically the victims of the harsh rule by law<sup>193</sup> (Head and Wang, 2005: 63-70; Yang, 1937: 4). This meant that the Chinese have carried a terrible collective image of the rule by law (Li, 2012: 3) and their negative perceptions would only be amended by ‘substantive justice’ (Woo and Gallagher, 2011: 13). Judges in China are morally expected to uphold substantive justice, but the idea of this elusive concept is mostly defined and distinguished by the public (Anson et al., 2009: 211). So let us be realistic; it is impossible for a Chinese judge with a great reputation to rid himself of public influence (and pressure) in such a society.

Public support is what the courts survive on, and if they ignore this they do themselves a great disservice. [...] Public opinion is important, the whole legal system depends on it in one way or another. (Mackenzie, 2005: 140)

In contrast to American legal studies (Collins and Collins, 2008: 165-186; Wrightsman, 1999: 56-82), the Chinese concept of public pressure against judges (Wrightman, 1999: 27-56) is unsophisticated. However, at the empirical level, the concept provides the Justices in Taiwan with great flexibility in making either sincere or strategic decisions (Epstein and Knight, 2000: 625-653; Spiller and Gely, 2007: 2-15). As long as it is

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<sup>192</sup> Because the Confucians replaced law with morality (Ren, 1997: 19-23), morality has become China’s natural law (Finnis, 1980: 18) and is being further legitimised (Jernigan, 1905: 72; MacCormack, 1996: 54).

<sup>193</sup> The Chinese cannot distinguish rule *of* law from rule *by* law linguistically because the Chinese language can only express ‘rule in accordance with law’.

commonly defined as ‘public opinion’, the Chinese classical legal and political theories will continually breed judicial legitimacy to the Justices – with or without sophistication – thus avoiding Western constitutional dilemmas such as countermajoritarian difficulties (Bassok, 2012: 335-382) by simply focusing on Hoekstra’s two models of public support for the Judicial Yuan (Hoekstra, 2003: 12-15), i.e., what is the expectation of the mass to the Justices (diffuse support), and what is the evaluation of the mass to a specific judicial decision (specific support)?

That is to say, unlike the American court studies, Taiwan’s studies in relation to the interaction between the Justices and the masses should focus more specifically on the Hoekstra models of public support, paying full attention to how these Justices make strategic decisions on a case-by-case basis.

#### **4.3 MENDEL, GINSBURG AND THE JUDICIAL YUAN**

It is no exaggeration to conclude that the world does not pay much attention to Taiwan or its legal system – despite the fact that its Justices dismissed the authoritarian congress in favour of democratisation and struck down an unconstitutional constitutional amendment – and most legal scholars worldwide do not even hear of these exploits: According to Fell, ‘Judged only by its population and size, Taiwan ... would not commend much attention in the global community’ (Fell, 2012: Foreword).

Mendel is probably the first non-Taiwanese legal academic to study Taiwan’s Judicial Yuan. In his 1993 article (Mendel, 1993: 157-189), Mendel applied the attitudinal model (Segal and Spaeth, 1993: 390) to the Justices, holding that the then Justices were well aware of changes in the political atmosphere, and considered that the right time

had come to achieve their political ideal (ibid: 176-189) of democracy and rule of law. Mendel's model was later validated by Ginsburg.

Ginsburg applied the strategic model (Epstein and Knight, 2000: 625-653) to the Judicial Yuan, explaining that:

The Taiwan example illustrates the merits of careful expansion of judicial power through a gradual, step-by-step process. Individual cases illuminate the judges' careful process of testing how much judicial power political authorities would tolerate [...] (Ginsburg, 2003: 106)

The expansion of judicial power was achieved, and 'as of 1998 no government body had failed to comply with any order from the council, issued after democratization commenced in 1987, to amend legislation or administrative regulations' (ibid: 144). In other words, Ginsburg's model represents a milestone in studies of Taiwan's Judicial Yuan, because he made a great contribution to Taiwan's fundamental methodology of judicial power expansion.

It is to some extent a little embarrassing that the first two models of Taiwanese judicial behaviour were developed by non-Taiwanese legal academics – both the attitudinal and strategic models. Taiwanese legal academics are not yet interested in knowing how their judges and Justices think, although Taiwanese legal academics have achieved impressive theoretical and empirical developments. However, no legal academic anywhere has sought to continue Ginsburg's work because Taiwan is generally considered too small and ineffective to be heard. Therefore, since Ginsburg's 2003 publication there has been no further studies Taiwan's court system until this thesis.

There remains one puzzle that both Mendel and Ginsburg fail to explain: on what grounds would Taiwan's political authorities choose to 'tolerate' (ibid: 106) or comply with the judicial decisions made by the Justices? In 2015 Vanberg, using his endogenous and exogenous models (Vanberg, 2015: 167-182), concludes that the political authorities' submission to judicial decisions is purposive:

Executives and legislators respect judicial authority only as long as, on balance, the presence of independent courts sufficient benefits or subverting them is too costly. There are limits to the willingness of the other branches to respect judicial authority. (ibid: 179)

Although it seems a little unfair to criticise Mendel's 1993 article in the light of Vanberg's work more than two decades later, the fact remains that Mendel chose to avoid properly answering a question of which he was well aware, namely why do Taiwan's political authorities choose to respect judicial authority?

The ROC Council of Grand Justices has contributed to this period of reform through a number of constitutional interpretations which have resulted in greater individual liberties and further restrictions on government actions. This has been accomplished even though the Council operates against substantive and procedural limitations on its power. [...] The Council [...] is not sufficiently protected from the influence of other government branches and still issues decisions carefully. (Mendel, 1993: 157)

The quote cited here implies Mendel's paradox – on the one hand, he agrees that the Justices successfully imposed their will upon other branches of government; on the other, he believed somewhat paradoxically that the Justices were not fully protected from political intervention (ibid: 167-189). How can a court that is respected in reality not be fully protected? The only answer given by Mendel is that the court is protected by its relationship with public opinion, although he does not pay much attention to this issue:

The Council's gradualist approach toward regaining its full constitutional authority has made [...] contributions in the areas of individual rights and political reform. [...] The Council [...] responded to the public's dissatisfaction with the government by issuing interpretations [...] (ibid: 176)

In contrast to Mendel's work, which mainly applied the attitudinal model, holding that the Justices attempted to 'regain their power' (ibid), Ginsburg built his explanation on Mendel's sub-argument, careful decision-making (ibid: 176-189), applying the strategic model to Taiwan's Justices (Ginsburg, 2003: 106-157). However, Ginsburg still disregarded the interaction between the Justices and the public, paying more attention to how Justices decide strategically in Taiwan. For example:

As the council expanded its power over various subjects and appellate review power, it turned to the question of enforcement of its judgements. [...] The council [...] stipulating that unconstitutional government or legislative action had to be remedied within a particular period of time or the provision in question would be void. (ibid: 143)



Ginsburg's contribution lies in his impressive discovery of the way the Justices in Taiwan imposed their will upon other branches of government, but he still failed to provide a sophisticated answer as to how the Justices actually managed to accomplish this. Ginsburg successfully displayed diverse methods reflecting the strategies of judicial power expansion adopted in Taiwan, offered no explanations in relation to the root causes of Taiwan's judicial power expansion.

This is the principal reason for this research project. Both Mendel and Ginsburg were more or less aware of the importance of public opinion in Taiwan's judicial decision-making; however, they were both unaware that public opinion is the key variable in explaining the roots of judicial power expansion in Taiwan. Through the remodelling of Taiwan's Justices according to Vanberg's new approaches (Vanberg, 2015: 167-182), Mendel and Ginsburg's incomplete study of Taiwan's judicial power expansion may be continued.

#### **4.4 MODELLING THE JUDICIAL YUAN**

[A king] who is not benevolent is simply a demon; [a king] who is not just is merely a ruffian. One who is neither benevolent nor just is no longer qualified to be a king and should be deposed. [Therefore], I only know a person named Zhou [King Zhou of Shang] being killed, instead of a king being overthrown.<sup>194</sup> – Mencius (372-289BCE)

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<sup>194</sup> Author's Translation.

If the ancient Chinese had any sense of democracy, that concept would definitely be refined by Mencius under the ideals of Confucianism around 2400 years ago. Of course it is unfeasible to evaluate Mencius' political thought against a background of modern democracy; however, his 2400-year-old political idealism on the subject of indirect democratic legitimacy helped shape the Taiwanese Judicial Yuan into an ideal of judicial power expansion.

According to Nigel N.T. Li, the Chinese idea of democracy in Confucianism comprises only democracy *of* the people and *for* the people, but not *by* the people (Li, 2012: 50-52). The Confucian school therefore always highlighted the need for interaction between the ruler and the ruled (ibid: 42-45) in order to maintain good governance and provide indirect legitimacy. The common Chinese people had no participation in governance, leaving them with only a poor sense of procedural justice that continues today (Woo and Gallagher, 2011: 13). To some extent it is reasonable to assume that the Chinese people do not really care about procedural details (elections) as long as their demands are fulfilled (Wang, 2010a: 38). This provides a crucial cultural variable allowing judicial power expansion as long as the Justices decided strategically, in line with the preferences of public opinion (Garoupa and Ginsburg, 2009: 452-457).

Mencius' ancient political doctrine determines that Baum's judicial audience theory (Baum, 2006: 25-49) is applicable to Taiwan, and the audience is chosen (ibid: 46-47) culturally. Mencius' political approach emphasises the importance of the interrelation between government officers (including judges) and the common people (public opinion) because it refers to a decision maker's legitimacy in the Chinese world (King, 1993: 53-68). This compels Taiwan's Justices to remain on the side of public opinion in order to fulfil their legal responsibilities (legal motivation: Posner, 2008: 84-85),

political ideals and even their self-interests (ideological and self-interested motivations: Epstein and Knight, 2013: 24-26). In other words, Mencius' political thoughts provide immutable grounds for a judiciary-public opinion alliance according to Baum's audience theory:

People want to be liked and respected by others who are important to them. The desire to be liked and respected affects people's behaviour. In these respects, judges are people. (Baum, 2006: 25)

This opinion also implies that judges may attempt to placate their audiences strategically (Baum, 1997: 89-124), and that any judicial decision that favours public opinion may suggest that public opinion 'played an appreciable part in causing (a case) ... to be decided the way it was' (Rehnquist, 1987: 98). When it comes to Taiwan, the statistics are even more persuasive because no case decided by the Justices in the 1990s (there were 249 in total) is found to contradict the public opinion that pertained at the time, whilst many cases were observed in which the Justices deliberately chose not to provoke the masses. As a matter of fact, Mencius' political doctrine provides an even stronger motivation for Taiwan's Justices to placate their main audience via Carrubba's dynamic model (Carrubba, 2009: 55-69). As the beneficiaries of Mencius' philosophy, the Justices would have had few reasons to be concerned about Bickel's well-known countermajoritarian difficulties (Bickel, 1962: 9-22). In other words, the Justices in Taiwan could override executive actions and acts of legislature (Whittington, 2007: 230-284) with few worries about attracting censure on the grounds of legitimacy (Friedman, 1998: 334-343), as long as they were able to convince the majority of the public that they were right (Carrubba, 2009: 55-69). They could take advantage of the fact that as a result of cultural advantages in the Chinese world (Shapiro, 1981: 157-

193), legitimacy may spring from public support (Hoekstra, 2003: 12-15) directly (Li, 2012: 42-45):

[B]ecause courts are, by their nature, weak institutions, as famously argued by Alexander Hamilton in Federalist 78. Without either ‘the purse or the sword’, they must largely rely on other actors to give life to their decisions. (Vanberg, 2015: 168)

Executives and legislators respect judicial authority only as long as, on balance, the presence of independent courts sufficient benefits or subverting them is too costly. There are limits to the willingness of the other branches to respect judicial authority. (ibid: 179)

Mencius’ political philosophy of indirect democratic legitimacy also strengthens Taiwan’s endogenous and exogenous conditions for judicial power expansion (ibid: 167-182). As far as Taiwan’s endogenous condition is concerned, it is quite obvious empirically that having a powerful and independent Judicial Yuan would help the Executive Yuan and the Legislative Yuan ‘to achieve their purposes more efficiently than would be possible in its absence’ (ibid: 170). The Justices are always the ultimate political arbitrators between two branches of government, and it is not difficult to see that Taiwanese state organs are used to resolving political controversies (separation of powers games) via judicial reviews (39 cases). Moreover, it is very impressive that the Taiwanese state organs were able to consult the Justices about internal affairs voluntarily (19 cases), requesting a compulsory advisory opinion for direction:

[A]s for the Legislative Yuan’s submission of an official letter titled Tai-

Yuan-Yi No. 2162 to this Yuan on July 26th of this year (1994), in which the former Yuan sought to obtain this Yuan's opinion on whether Members of that Yuan are qualified to propose future amendments to the unconstitutional Article 1089 of the Civil Code, the request made is not in conformation with [...] the [...] Act [...] it is therefore unnecessary to make a further interpretation.<sup>195</sup>

In *Judicial Yuan Interpretation No.365* [1994], the Legislative Yuan requested a judicial review as to how to amend Taiwan's Civil Code 1929. The Judicial Yuan replied that it was beyond the remit of the judicial power because a bill is not a law. Even though it is reasonable to conclude that the Legislative Yuan in this case attempted to accomplish a task more efficiently (Vanberg, 2015: 170), it also implies that, from the Legislative Yuan's perspective, the Judicial Yuan's authority had already been accepted and acknowledged (indirect democratic legitimacy). If the Justices were not satisfied with these modifications, they could strike these modifications down. So why not ask the Justices first?

In relation to Taiwan's exogenous conditions, Mencius' political thought plays a crucial role that makes the Executive Yuan or the Legislative Yuan 'too costly' (ibid: 176) to defy the Justices' decisions. As mentioned previously, the Chinese concept of legitimacy is not a procedural issue of entitlement, but always springs from public support (Hoekstra, 2003: 12-15) in accordance with Mencius. In other words, raising countermajoritarian arguments (Bickel, 1962: 9-22) does not directly constitute an effective attack against the Justices if the Justices earn massive public support in a

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<sup>195</sup> *Judicial Yuan Interpretation No.365 Reasoning* [1994] (Official Translation).

specific case (Hoekstra, 2003: 12-15). In contrast, challenging any state organ with massive public support in Taiwan would almost assuredly bring political suicide:

Generally speaking, whilst the atmosphere is that public opinion obviously supports the Justices of the Judicial Yuan, the Legislative Yuan would never act rashly and blindly!<sup>196</sup> (Interview with Li on 17-JUN-2013)

To some extent it is reasonable to conclude that Mencius' indirect democratic legitimacy has been rendered more sophisticated largely by Vanberg. His indirect enforcement mechanism (Vanberg, 2005: 1-178) for German court studies echoes Mencius' political vision of the interrelationship between the courts and public opinion, testifying to the effectiveness of his 2400-year-old theory:

[I]f the public is sufficiently aware of the case, if the case is sufficiently transparent (i.e., not too legally complex) such that the public can tell whether the government complies with the court ruling, and if the public agrees with the court's preferred outcome, then the public can act as an indirect enforcement mechanism by sanctioning its government for evasion for a court ruling. (Carrubba and Gabel, 2015: 215)

Although Vanberg does not intend to redefine Mencius' definition of legitimacy, he does acknowledge that public opinion could in reality restrict a decision-maker to fewer choices. However, unlike Mencius, who illustrated no precise scope for this mechanism,

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<sup>196</sup> Author's Translation.

it is obvious that Vanberg disambiguates Mencius' political thought to two prerequisites:

1. Vanberg highlights the importance of transparency as a prerequisite to the effectiveness of Mencius' idea. If the public remains unaware of the case, the indirect enforcement mechanism is ineffective (Vanberg, 2005: 95-115).
2. Vanberg also indicates that the indirect enforcement mechanism is effective only within non-complex cases (ibid: 19-60) because the public could easily express an opinion – if the case is too complicated, the public may have no interest in it at all.

Vanberg's indirect enforcement mechanism was later used by Staton in Mexican court studies (Staton, 2006: 123-204). However, Vanberg's mechanism is still an unfamiliar (or even unknown) concept in studies of Taiwanese court, despite the fact that it shares so many similarities to Mencius' political philosophy. Ginsburg's great work on Taiwan was accomplished in 2003 (Ginsburg, 2003: 106-157) and he was thus unable to evaluate Taiwan's judiciary-public opinion alliance in the light of Vanberg's mechanism, thereby leaving a question mark hanging over his work by inquiring: 'how can a constitutional court that served an authoritarian regime become an instrument for democracy and human rights?' (ibid: 106) In this thesis Ginsburg's question can be answered as follows:

1. A study of the interaction between a court and public opinion shall focus on the cases that the mass public are aware of. It is illogical to study cases where there is no public opinion. This thesis shall therefore follow Vanberg's theory,

limiting its research scope to those Taiwan's judicial reviews which attracted public attention in the 1990s.

2. Concerning the transparency issue raised by Vanberg, this is of course crucial to Taiwan. However, Taiwan has a very different media culture, and even Taiwanese journalists believe that Taiwan is a nation of court transparency (Interview with Wang on 27-SEP-2014). Therefore, this thesis will not concentrate on how the Justices 'attempt to' display themselves publicly – although Baum's judicial self-presentation theory (Baum, 2006: 25-49) may come to be appreciated by the Judicial Yuan in the future.

## **4.5 SUN YAT-SEN AND CARSON CHANG**

China in a way had three coördinate departments of government, just as the modern democracies of the West have their three departments, with this difference – the Chinese government has exercised the powers of autocracy, censorship, and civil examination for many thousands of years, while Western governments have exercised legislative, judicial, and executive powers for only a little over a century. However, the three governmental powers in the West have been imperfectly applied and the three coördinate powers of ancient China led to many abuses. If we now want to combine the best from China and the best from other countries and guard against all kinds of abuse in the future, we must take the three Western governmental powers – the executive, legislative, and judicial – add to them the old Chinese powers of examination and censorship



and make a finished wall, a quintuple-power government. Such a government will be the most complete and the finest in the world. (Sun, 1927: 357-358)

According to Ching Chih-Jen, Sun Yat-Sen's fancy constitutional creation, namely the Pentapartite system, was embodied in the ROC Constitution because of the nationalists' political persistence within the Constituent National Assembly in 1946 (Ching, 1984: 437-445). He said:

Though the Nationalist Party deeply respected the agreements decided in the Political Consultative Conference, they upheld that it was improper to alter the fundamentals of [Sun Yat-Sen's] division of political rights and governing power, as well as [his] Pentapartite constitution. Thus, [they] wished that the other political parties could respect [China's] history of revolution under which the Nationalist Party founded the Republic [of China and thereby] understood their [political] position and claim.<sup>197</sup> (ibid: 443)

Despite the fact that Sun Yat-Sen undoubtedly masterminded the Pentapartite system (Wang, 2000: 17-18), this thesis argues that he actually misunderstood the separation of powers doctrine completely. He devised a new constitutional doctrine, dividing political rights from ruling powers, splitting China's political activities into two categories: the four political rights owned by the people (the rights of suffrage, recall, initiative and referendum), and the five ruling powers (executive, legislative, judicial,

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<sup>197</sup> Author's Translation.

control, examination powers) owned by the government (ibid). This looked a good in theory but did not work in practice, because:

1. Sun Yat-Sen completely misunderstood the operation of representative politics when trying to improve it. The legislative power is not and cannot be a ruling power in accordance with representative politics in theory. The legislative power is actually an instrument of political rights owned by the people.
2. Sun Yat-Sen did not understand that in theory the will of the people is materialised by using legislative power, and thus it would be very dangerous to categorise the legislative power into an institutional ruling power. Astonishingly, Sun Yat-Sen intended to create a National Assembly as China's house of representatives, while giving almost all the legislative powers to the government-owned Legislative Yuan.
3. In this sense, Sun Yat-Sen misunderstood the doctrine of separation of powers. His Pentapartite system is not a constitutional system based on separation of powers, and his system only creates five ministries of execution, legislature, judiciary, control and examination for the ROC Government.
4. Sun Yat-Sen's misunderstanding reflects the Chinese cultural sense of politics – even the Members of the Legislative Yuan can be governmental officials. If lawmakers are accepted as governmental officials, why can't the

Justices become lawmakers simply because they are not elected by the people?

Carsun Chang, the accredited founding father of the Constitution of 1947 who drafted the Constitution by coordinating the interests of each political party at the 1946 Political Consultative Conference, finally accomplished a Montesquieu type of constitution using Sun Yat-Sen's Pentapartite idea (Wu, 2004: 51-54). The Constitution supposedly acts as a system of checks and balances between the five powers (ibid), though the two powers Sun Yat-Sen created do not subsequently show their political importance (Lee, 1997: 212-215). Carsun Chang recalled:

One day I told Mr Sun Fo that I had already drafted a constitution. [I could share my draft constitution with all the members of the 1946 Political Consultative Conference] if they wanted, it would be fine [to me] if they did not want [my draft] (submitted on 12 April). Then surprisingly [my draft] was accepted and printed out by Secretary-General Lei (Chen) as the blueprint for discussion. [...] The [Nationalist] Government demanded Democratic National Socialism, we wanted democratic politics like Europe and America. The [Chinese] Youth Party asked for a Westminster system, [and] the [Chinese] Communist Party insisted on judicial independence between provinces [judicial dualism], as well as international trade localisation. [...] About the Pentapartite [system], Sun Yat-Sen pieced the [political] systems of foreign nations together; although [he] attempted to create an ingenious [new constitutional design], everybody had witnessed how [in]effective the Pentapartite constitution had been over the past 20 years. [However], the

Nationalist Party would never abandon the nominal Pentapartite system, thus [I gave them] the system as usual [...] <sup>198</sup> (Yang, 1993: 130-131)

## 4.6 THE NATURE OF THE JUDICIAL POWER

[T]herefore, the feature of the judicial power could be summarised as:

1. Judicial power is passive, so the principle of no trial without complaint applies.
2. Judges are independent and neutral, thus the judges' free exercise of power from [any] interference must be secured, and the recusal regulation also applies.
3. [The Judiciary] safeguards the due process of law, so that various procedures, investigations [and] debates are compulsory.
4. Judicial power is authoritative; [therefore], it has the ultimate jurisdiction over legal issues. <sup>199</sup> (Weng, 1994: 355)

The above definitions of the features of judicial power were written by Chief Justice Weng Yueh-Sheng of the ROC within his masterpiece, *The Administrative Law and Constitutional Law of the Rechtsstaat* (1994), in which he attempted to illustrate his personal and professional opinions about the worldwide trend of judicial power development. One of his profoundest commentaries was:

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<sup>198</sup> Author's Translation.

<sup>199</sup> Author's Translation.

As everyone [in the world] knows, Montesquieu not only promoted the Tripartite system but also the idea of checks and balances [...] he did not believe that the judiciary would be able to check and balance either the executive or the legislature; therefore, the [original] system of checks and balances that he promoted was only between the executive and legislature, rather than between the judiciary and legislature and between the judiciary and executive [...] he did not foresee that the judiciary could check and balance the legislature and executive. [...] After judicial power has played [an important role] within [modern] legal constitutional [development], [even] the political institutions [legislatures] and politicians, as well as political activities are all subject to the law and [also] adjudicated by the courts. Such a trend [of judicial power development] goes far beyond anything Montesquieu ever imagined.<sup>200</sup> (ibid: 336-340)

Chief Justice Weng Yueh-Sheng observed the world's judicial development in democracies and concluded that the political balance between, as well as the legal constitutional roles of, the three powers are actually floating and by far-reaching (ibid: 329-350). His opinion about Montesquieu's Tripartite system was that, in Montesquieu's mind, as long as the judiciary remained completely independent without intervening politically, the judiciary would already count as a qualified judicial department within the Tripartite system. In other words, Montesquieu demanded only an independent adjudicator who must remain free from political intervention. Marshall, however, had instituted a powerful constitutional interpreter who should and could

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<sup>200</sup> Author's Translation.

intervene (or control) politics constitutionally, even though the principle of judicial independence still remains fundamental:

But the judiciary in Montesquieu's scheme has no grand power akin to what will come to be known as judicial review, the power of courts to determine the constitutionality of ordinary legislation. And even when it comes to the separate powers keeping one another in their proper places, it is primarily the political give-and-take between the executive and the legislative, not the exercise of judicial power as a matter of constitutional law, that maintains that necessary system of balances and checks. (McDowell, 2010: 221)

#### **4.7 FAVOURING THE GUARDIAN OF THE CONSTITUTION THEORY**

In contrast to other democracies in which the courts are regularly doubted and challenged by countermajoritarian difficulties (Bickel, 1962: 9-22), the Justices of Taiwan have few reasons to be criticised on the grounds of legitimacy (Friedman, 1998: 334-343) because of Mencius' political thought. However, the Justices not only apply Mencius as political safeguard, they also largely promote Schmitt's theory as political grounds for the expansion of judicial power (Sze and Tsai, 2007: 699-700). Therefore, it is crucial to discuss this German concept in the context of Taiwanese court studies, as one result of the concept promoted by the Justices is Carrubba's strategy (Carrubba, 2009: 55-69) which states that the Justices will attempt to make people believe that the German concept is just:

Since the Weimar Constitution, we are once again interested in the

specific Guardian of the Constitution theory, and seek for its [genuine] safeguard and protection. The State Court of the German Reich declares itself to be ‘the Guardian of the Constitution of the German Reich’. Yet the President of the Supreme Court of the German Reich, Dr Simons, called the Supreme Court ‘the Ward and Watch’ of the Constitution. Many proposals suggest that either the State or the Constitutional Court should [behave] as guardian, guarantor, watch or trustee of the Constitution, [and this] issue has become conspicuous within the legal profession.<sup>201</sup> (Schmitt, 1931: 3)

The above quote comes from Carl Schmitt’s book, *Der Hüter der Verfassung*, originally published at Tübingen in 1931. Schmitt wrote his *magnum opus* to discuss the most suitable safeguard for the Weimar Constitution of 1919, following the trend raised by Hans Kelsen’s constitutional court proposal (Baume, 2012: 1-6; Lane, 2008: 176-177; Robertson, 2009: 174-200) in Austria in the 1920s. Both Schmitt and Kelsen represent human efforts to seek for an ultimate constitutional safeguard in order to ‘establish for their future government such principles as, in their opinion, shall most conduce to their own happiness’<sup>202</sup> – despite the fact that Schmitt’s original idea of constitutional safeguard was not the German judiciary but the President of the Reich (Schmitt, 1931: 132-159). However, Schmitt foretold in 1931<sup>203</sup> that such legislations:

[M]ostly refer to the inevitable [issue of] *quis custodiet ipsos custodes*

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<sup>201</sup> Author’s Translation.

<sup>202</sup> *Marbury v. Madison*, (1803) 5 U.S. 137.

<sup>203</sup> Carl Schmitt’s opinion on the constitutional amendment changed very dramatically. Before 1933, he argued that the Reichstag could not pass any amendment because the Weimar Constitution had its basic structure. But when he became a *Kronjurist* in 1933, he changed his position 180 degrees and said that there should be no limits to the amendment process (Dyzenhaus, 1999: 38-101; Müller, 2003: 63-75).

as well as an additional warning that those guardians [could] easily make themselves masters of the Constitution and [thereby] bringing in the danger of [having] double heads of state [...] <sup>204</sup> (ibid: 7)

In other words, Carl Schmitt foresaw <sup>205</sup> and foretold the mighty political power of being the guardian of the constitution in 1931 – reflecting what Justice Charles Evans Hughes said on 3 May 1907:

We are under a Constitution, but the Constitution is what the judges say it is [...] (Hughes, 1908: 139)

The German people, along with the Weimar Republic, examined what Chief Justice John Marshall said in *Marbury v. Madison* (1803) via the extraordinarily expensive lesson learned by Adolf Hitler and his Third Reich. They eventually learned a lesson and concluded that:

Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible. <sup>206</sup>

The German Basic Law of 1949 directly prohibited any of the German legislatures from altering the ‘principles laid down in Articles 1 and 20’ <sup>207</sup> because these principles were

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<sup>204</sup> Author’s Translation.

<sup>205</sup> In Taiwan, Schmitt’s legal term, *der Hüter der Verfassung*, is widely used and appreciated by the Judicial Yuan (Sze and Tsai, 2007: 699-700) as well as legal professionals, because of the German legal transplantation, which meant that as far as the Taiwanese legal professionals were concerned, Schmitt was the pioneer who foresaw the political power of the constitutional interpreter.

<sup>206</sup> Basic Law of Germany § 79III (1949) (Official Translation).

<sup>207</sup> Id.



‘supreme, and ... designed to be permanent’.<sup>208</sup> This took the protection of German constitutionalism from unconstitutional constitutional amendments one step further – as history shows, this was the most expensive constitutional lessons in law that the German people learned from their former ‘Reich und Führer’:

The National Assembly exercises its powers and carries out its duties in accordance with Article 174 of the Constitution in amending the Constitution with due process. The resulting enactment of the Amendment to the Constitution has equal status with the original constitutional provisions, yet the permission of any amendment designed to alter existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution’s very existence destroys the integrity and fabric of the Constitution itself. As a result, such an amendment shall be deemed improper. Although our Constitution does not expressly identify those unchangeable provisions, among the several constitutional provisions, principles such as establishing a democratic republic under Article 1, sovereignty of and by the people under Article 2, protection of fundamental rights of the people under Chapter Two as well as the check and balance of governmental powers are some of the most critical and fundamental principles of the Constitution. Constitutional freedom and democratic rule of law derived from these principles (See Article 5, Paragraph 5, Amendment to the Constitution and Interpretation No. 381), are the foundations upon which the current Constitution is constructed,

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<sup>208</sup> *Marbury v. Madison*, (1803) 5 U.S. 137.

and all institutions installed thereunder are obligated to abide by its rules. Since the National Assembly is a constitutionally installed institution and its power is bestowed by the Constitution, it must also be regulated by the Constitution. At the time of inauguration, delegates of the National Assembly must be sworn in and pledge allegiance to the Constitution. This means loyalty and adherence to the Constitution which must be taken into consideration while exercising the power granted by Article 174 of the Constitution in amending that Constitution. In the event an amendment to the Constitution touches purely on the adjustment of national organizational structure, it falls under “the discretionary scope of the institution empowered to amend the Constitution, taking into consideration the totality of the circumstances” (See the Reasoning for Interpretation No. 419, COMPILATION OF JUSTICES INTERPRETATIONS, SECOND SERIES, Volume 10, p. 333) and must be respected. However, any violation that touches upon the basic principles of constitutional freedom and democratic rule of law breaches the fiducial duty to the people, affects the foundation of the very existence of the Constitution, and must be checked and balanced by other constitutionally installed institutions. This is also the built-in, self-defensive mechanism in the Constitution. Therefore, any provision that contradicts the basic principles of the Constitution and results in a conflict of rules does not possess proper merits.<sup>209</sup>

*Res dura, et regni novitas, me talia cogunt. Moliri, et late fines custode*

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<sup>209</sup> Judicial Yuan Interpretation No.499 Reasoning [2000] (Official Translation).

*tueri.* – Publius Vergilius Maro (70-19BCE)

Since its establishment in 1951, the German Federal Constitutional Court has not yet experienced an unconstitutional constitutional amendment. However, the ROC Judicial Yuan was unfortunately forced to deal with such an issue in 1999, and made a decision on 24 March 2000.<sup>210</sup> In this case the Justices struck down the fifth amendment of the Constitution (promulgated on 15 September 1999) and showed their courage and determination to be guardians of the constitution:

The anonymous balloting by which the Third National Assembly adopted to vote on the proposed amendments to Articles 1, 4, 9 and 10 of the Amendment to the Constitution in its 4th Session, 18th Conference on September 4, 1999, violated the principle of openness and transparency and the then-applicable Article 38, Paragraph 2, of the Regulations of the National Assembly Proceedings. The process was clearly and grossly flawed and in violation of the fundamental principles based upon which the provisions of the Constitution would take effect. Among the provisions in question, the contents of Article 1, Paragraphs 1 to 3, and Article 4, Paragraph 3, further conflict with the fundamental basis upon which the Constitution relies for its very existence, and are not permitted by a state of freedom and constitutional rule of law. As to Articles 9 and 10, while their contents are not in question, they shall nevertheless lose their effect since the process violates the due process in amending the Constitution. The aforementioned Articles 1, 4, 9, and

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<sup>210</sup> *Judicial Yuan Interpretation No.499* [2000].

10 shall immediately become null and void as of the date this Interpretation is announced, and the text of the Amendment to the Constitution promulgated on July 21, 1997, continues to be effective.<sup>211</sup>

#### **4.8 JUDICIAL POWER EXPANSION IN TAIWAN**

The Chinese people traditionally show radical preference for substantive justice, to the extent that if anyone were to bring them substantive justice, they would give them power in return.

The author understands such a cultural comment as this, although it makes good sense within Chinese communities worldwide that the pursuit of substantive justice is China's core of the jurisprudence, as Gao Xi-Qing and Judge Chou Yu-Lan said:

For the Chinese, substantive law always represents the ultimate sense of fairness and social justice, which for the most part is reflected by the customs, practices and usages of Chinese society. The written law is only a form through which to realise justice. As long as justice is done, people are not bothered too much about the statutory basis of the judgement. To most Chinese, 'due process' is an unknown quantity. To the legal profession, it is something desirable, rather than something indispensable. (Gao, 1989: 89-116)

If there is a conflict between substantive justice and procedural justice,

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<sup>211</sup> *Judicial Yuan Interpretation No.499 Reasoning* [2000] (Official Translation).

unless it is a serious infringement of the defendant's personal rights, I will prioritise substantive justice.<sup>212</sup> (Interview with Chou on 24-JUN-2013)

The legal grounds for choosing 'prioritising substantive justice' (ibid) is provided in the ROC Criminal Procedure Law 1928, which is an act of the Legislative Yuan that embodies the Chinese traditional preference for substantive justice:

The admissibility of the evidence, obtained in violation of the procedure prescribed by the law by an official in execution of criminal procedure, shall be determined by balancing the protection of human rights and the preservation of public interests, unless otherwise provided by law.<sup>213</sup>

According to this article, criminal evidence 'obtained in violation of the procedure prescribed by the law by an official'<sup>214</sup> is not directly inadmissible, because judges are empowered to decide on admissibility, and their decisions are only subject to the principle of proportionality 'unless otherwise provided by law'.<sup>215</sup> In other words, the procedure for obtaining criminal evidence can be ignored in accordance with judicial decisions authorised by an act of congress in the event of public interests prevailing over human rights.<sup>216</sup> What we can conclude is that the Taiwanese prefer substantive justice to procedural justice, because due process is just 'something desirable, rather than something indispensable' (Gao, 1989: 89-116).

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<sup>212</sup> Author's Translation.

<sup>213</sup> Criminal Procedure Law § 158-4 (1928/2003) (Official Translation).

<sup>214</sup> Id.

<sup>215</sup> Id.

<sup>216</sup> See id.

This thesis has no intention of arguing that substantive justice is dominant and little importance is attached to procedural justice in Taiwan. Evidence provided by Article 158-4 of the Criminal Procedure Law 1928/2003 only shows that procedural justice is not ‘indispensable’ (ibid). This does not mean that due process is undesirable, so the employment of the proportionality principle is required. However, this thesis puts forward an argument that judicial decision-makers in Taiwan have benefited greatly from such cultural characteristics, because due process has never become the core of the Chinese sense of justice (ibid). Judges are not criticised in accordance with counter-majoritarian arguments (Bassok, 2012: 335-382) in cultural terms. Moreover, this thesis has no intention of arguing whether substantive justice or procedural justice is more important; this thesis seeks only to explain the chain reaction of public and cultural preferences over substantive justice within a Chinese judicial system:

1. Procedure, to the Chinese people, is considered as a method of pursuing substantive justice; if it becomes obvious that procedure is becoming an obstacle to substantive justice, the Chinese people will ignore procedural issues unhesitatingly.
2. Election (procedure) is deemed a method of pursuing good governance in Taiwan, but there is no guarantee that the electoral Legislative Yuan would do everything on behalf the people. If there is an extreme political situation in which the electoral Legislative Yuan does not legislate in accordance with the will of the people, the Taiwanese people would expect that the Judicial Yuan would safeguard the people’s interests

(substance) from unconstitutional acts of the legislature enacted by the electoral Legislative Yuan (procedure).

3. This thesis argues that the Judicial Yuan becomes an alternative lawmaker in the event of the National Assembly and the Legislative Yuan going beyond or against the will and interests of the people (dereliction of legislative duty). It is therefore vital that the Judicial Yuan reads and analyses Taiwan's public opinion correctly (judicial strategy) before making judicial decisions as an alternative lawmaker (strategic decision-making).

## **4.9 JUDICIAL YUAN: ALTERNATIVE LAWMAKER**

This thesis argues that the Judicial Yuan acts as an alternative lawmaker if the National Assembly and the Legislative Yuan no longer follow the will of the people. This means that the political power of the Judicial Yuan is moulded systematically by its role as alternative lawmaker:

1. As an alternative lawmaker, the Judicial Yuan would not use its lawmaking power to override acts of legislature unless the Judicial Yuan knew that public opinion was standing on its side (specific support; Hoekstra, 2003: 12-15). In other words, the Judicial Yuan would not raise a traditional debate of judicial independence and judicial accountability (Bassok, 2012: 335-382; Shapiro, 2013: 380-397), because the Justices are well aware of the limits of their democratic legitimacy.

2. Because of limits to democratic legitimacy,<sup>217</sup> the Judicial Yuan is motivated to stand in line with public opinion in non-complex cases (Vanberg, 2005: 19-60), making decisions that are favoured and supported by the broader public (strategic decision-making). In other words, the Justices ‘want to maintain the Court’s legitimacy and thus its efficacy as a policymaker’ through interaction with their audiences, above all public opinion (Baum, 2006: 87).

Unlike the US Supreme Court (Flemming and Wood, 1997: 468-495), the connection between public opinion and the Judicial Yuan is not forged through electoral change. Party alternation in Taiwan does not have any clear influence over the Justices; however, the interaction between public opinion and the Judicial Yuan is still evident – when public opinion is clear, the Judicial Yuan will decide accordingly;<sup>218</sup> but when public opinion is divided, the Judicial Yuan will apply political question doctrine directly.<sup>219</sup> Nigel N.T. Li comments:

I think there are three interest groups that the Justices really care about: public opinion, law society and the other branches of government – especially the legislatures. The legislatures are not only the most powerful state organs against the Judicial Yuan, they also see themselves as the most qualified counterforces. To be honest, our national legislators

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<sup>217</sup> The Chinese pursuit of substantive justice has its legal philosophical limitations as far as this thesis is concerned. What is substantive justice? For example, is capital punishment substantially just or not? Though this thesis has no intention to discuss this legal philosophical issue, I should indicate that people are used to thinking that substantive justice reflects the majority voice. In other words, I agree only that the pursuit of substantive justice in Taiwan could be a check-and-balance method, controlling Taiwan’s representative democracy via the Judicial Yuan, making sure that the will of the people is materialised by law.

<sup>218</sup> E.g., *Judicial Yuan Interpretation No.476* [1999].

<sup>219</sup> E.g., *Judicial Yuan Interpretation No.328* [1993].



do not clearly understand the limits of the legislative power, so they always complain about why the Judicial Yuan can potentially override the legislation that they have put into place on behalf of the people. [...] One thing that I must remind you particularly right here is that [it is worth] paying attention to public opinion as a key [political] factor in conflicts between the Legislature and the Judiciary – generally speaking, whilst the atmosphere is that public opinion obviously supports the Justices of the Judicial Yuan, the Legislative Yuan would never act rashly and blindly!<sup>220</sup> (Interview with Li on 17-JUN-2013)

#### **4.10 CONCLUSION**

The pursuit of substantive justice was the original value orientation of China's legal system, and the emphasis on substantive justice and the neglect of procedural justice became barriers to the rule of law. The system paid no regard to whether or not law enforcement or court rulings were carried out in accordance with the law; as long as the result was favourable, there was no need to care about procedural details. (Wang, 2010a: 38)

The above criticism of China's traditional legal philosophy not only indicates China's cultural difficulty in building a rule-of-law legal system, but also implies China's cultural advantage towards judicial activism – 'as long as the result was favourable, there was no need to care about procedural details' (ibid).

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<sup>220</sup> Author's Translation.

It is useful to consider that criticism, especially in terms of whom that decision favours? The answer given by this thesis is the mass public, and it is probably the most persuasive answer that fits with the Chinese legal culture. Thus, the Judicial Yuan should not only be culturally obliged but also politically wise to read public opinion and make strategic decisions accordingly. Justice Herbert H.P. Ma says:

In terms of whether the Justice of the Republic of China take public opinion seriously or not, [and] the question of whether [they] read public opinion or not, I think, speaking overall, it is nearly impossible for a jurist in the Republic of China, including Justices and judges, to completely ignore social reactions [...] <sup>221</sup> (Interview with Ma on 19-JUL-2013)

In this chapter, we see that the ROC Constitution embraces the concept of judicial supremacy because of its founding father, Carsun Chang. We also acknowledge that his original constitutional design does not provide sufficient conditions for judicial supremacy in the ROC. In addition, we addressed the way Chinese people understand the relationship between the ruler and the ruled, including the political-philosophical ideal of ruling constructed by Mencius, cultural preferences for substantive justice and Sun Yat-Sen's misinterpretation of the separation of powers. All explain why Schmitt's concept of a guardian of the constitution is favoured in Taiwan, and how the Justices would behave if they intended to be that as they have implied (Sze and Tsai, 2007: 699-700).

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<sup>221</sup> Author's Translation.

## 5: STATISTICS OF THE REPUBLIC OF CHINA

### 5.1 INTRODUCTION

The records of the history of our nation show that statistics have been applied to governance by [our] administrators since the Zhou [1046-256 BCE] and Qin [221-206 BCE] dynasties, [proving that] the concept of [using] statistics dates back more than two thousand years.<sup>222</sup> (ROC Judicial Yuan, 1999: 1)

This description of the history of the use of statistics was provided by the Department of Statistics of the Judicial Yuan in 1999. It not only illustrates China's history of statistical analysis but also explains the political motive and purpose of using statistics to assist with policymaking. The concept of helping with decisions echoes the main notion of statistical analysis worldwide, as explained below:

[S]tatistics [...] are used to help people making decisions when there is not absolute certainty as to the final outcome of each alternative that could be selected by the decision maker. Many modern authors employ this notion in defining statistical analysis as a procedure for making decisions in the face of uncertainty. No one can tell with absolute certainty what is going to happen tomorrow, whether it be in the physical, social, economic, political, or psychic domain. [...] Statistical analysis offers a set of procedures which becomes a valuable tool for decision

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<sup>222</sup> Author's Translation.

making in the face of uncertainty. (Kent et al., 1980: 78)

An interesting and meaningful record by the Statistics Department of the Judicial Yuan shows that the ROC judicial statistics began with some simple and crude inner reports dating back to the foundation of the ROC in 1912 (ROC Judicial Yuan, 1999: 3), and were later bureaucratised formally by the Nationalist Government in 1935 (ibid: 3-10). In other words, it was the Nationalist Government's intention to collect judicial data and statistics in order to help decide avenues for judicial development. To some extent, it is reasonable to associate the initial nationalist purpose of producing judicial statistics with their authoritarianism, in that the government would control and direct the judiciary via statistics, although there is no clear proof of this intention. However, according to an official statement by the Department of Statistics of the Judicial Yuan in 1999:

[D]ue to [...] the popularisation of the merit of statistical analysis amongst management at all levels of government, statistics have become common practice as instruments of administrative supervision. [Furthermore, statistics] not only make a great contribution to administrative enforcement, but also functioned meaningfully in the realm of administrative project design and execution, as well as performance appraisal [...] <sup>223</sup> (ibid: 1)

Regardless of the genuine purpose for producing statistics, the Nationalist Government kept thorough and diverse statistical records of Taiwan's judiciary, which is both

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<sup>223</sup> Author's Translation.

expedient and advantageous in terms of the study of judicial development on the island. This chapter will therefore concentrate on examining and analysing official statistics, using statistics from several NGO statistics as supplementary information relating to the evolution of the media, legal education and practice, the Justices and the Judicial Yuan in Taiwan for the time period under study.

## **5.2 FROM MEDIA CONTROL TO PRESS FREEDOM**

Yet Taiwanese media operate in a much wider ideological spectrum than Chinese media, and they provide much more room for political debate. Each media outlet may be highly biased, but the diversity of views offered by these outlets arguably makes Taiwanese media more pluralistic than many mature democracies. Further, Taiwanese journalists may not take democratic norms seriously, but they do make politicians more accountable. In a comparative context, Taiwanese news coverage may be lacking in objectivity, but Taiwanese society offers considerable press freedom that is taken advantage of by Taiwanese journalists to provide checks and balances against public officials. (Tang and Iyengar, 2013: 3)

The image of Taiwan's mass media and the freedom of the press reported by Tang Weng-Fang and Shanto Iyengar in 2013 illuminates a crucial constituent of Taiwan's powerful media, namely its diversity of views – despite the fact that the literacy levels of Taiwan's media could be improved. The official number of Taiwan's newspapers, periodicals, news agencies and publishing corporations between 1990 and 2009 are summarised in Table 5.1.

### 5.1 Taiwan's Media Statistics, 1990-2009

<i>Year</i>	<i>Newspapers</i>	<i>Periodicals</i>	<i>Agencies</i>	<i>Publishers</i>
1990	209	4138	178	3273
1991	234	4338	188	3524
1992	272	4473	204	3769
1993	274	4761	231	4112
1994	300	4989	222	4439
1995	335	5231	221	4777
1996	361	5493	242	5253
1997	344	5676	251	5826
1998	360	5884	238	6380
1999	384	6463	242	6806
2000	445	6641	260	7093
2001	454	7236	267	7810
2002	514	3909	750	6023
2003	708	4896	949	7538
2004	2524	4185	977	7437
2005	2442	4825	1108	8357
2006	2381	5014	1208	9176
2007	2216	5395	1275	9625
2008	2065	5711	1321	10002
2009	2063	6457	1471	10953

(Source: Compiled by the author)

Table 5.1 shows the rich potential for research regarding the correlation between press freedom and diversity and the growth of media. In 1990, Taiwan had 209 newspapers, 4138 periodicals, 178 news agencies and 3273 publishers; by 2009, there were 2063 newspapers, 6457 periodicals, 1471 news agencies and 10953 publishers. Considering that Taiwan's population grew from twenty million in 1990 to twenty-three million in 2009, the above figures are very impressive and show that media grew out of all proportion to its potential readership:

[I]f a lawsuit with social concerns or interests was filed, it would be almost impossible for ordinary people not to hear about it. Moreover, judges are social elites, so they will pay more attention to relevant public issues. As to the judges in charge of the lawsuit, unless they deliberately ignore the media they could easily access the relevant information provided by the media.<sup>224</sup> (Interview with Wang on 27-SEP-2014)

Senior judicial news reporter Wang Wen-Ling of the United Daily News Group holds an LL.B degree and offers the best footnote on Taiwan's media, stating that it is very easy to access news reports and almost impossible to block information in this country. Wang's opinion underscores the importance of media diversity, particularly in contrast to Taiwan's notorious media suppression in the pre-democracy period, showing that the more newspapers, periodicals, news agencies and publishers there are within a country, the better press freedom that country has. Table 5.2 shows the contrast in statistics on the media from 1950 to 1990.

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<sup>224</sup> Author's Translation.

## 5.2 Taiwan's Media Statistics, 1950-1990

<i>Year</i>	<i>Newspapers</i>	<i>Periodicals</i>	<i>Agencies</i>	<i>Publishers</i>
1950	44	184	28	N/A
1955	34	378	39	242
1960	30	676	42	564
1965	31	820	43	805
1970	31	1404	43	1351
1975	31	1316	44	1345
1980	31	1982	44	2011
1985	31	2849	44	2725
1990	209	4138	178	3273

(Source: Compiled by the author)

## 5.3 LEGAL EDUCATION AND THE ADMISSION TO PRACTICE LAW

Law schools have been the first choice of the Joint College Entrance Examination for a decade in our nation, and thousands of elites devote themselves to studying law every year. [...] A law school student should acquire the general capacity and the correct disposition of being a lawyer, as well as being able to graduate from law school. However, Taiwan limits the admission to practice law to about six percent [of all the candidates], which means that it is seriously guilty of wasting national human resources. As for the remaining ninety-four percent of students, it means they are unfairly deprived of their chances to practice law.<sup>225</sup>

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<sup>225</sup> Author's Translation.



(Chen Charng-Ven: Judicial Reform Foundation 15 April 2001)

Chen Charng-Ven's words, written in his article 'Super Low Admission Rate [to Practice Law] Puts the Brakes on a Society Governed by the Rule of Law' in 2001, not only reflect his opinion on the low admission rate into legal practice in Taiwan, but also addresses the rise of legal profession after democratisation in 1990 (ibid).

### 5.3 Law School Students and Their Percentage of Total Students, 1949-2005

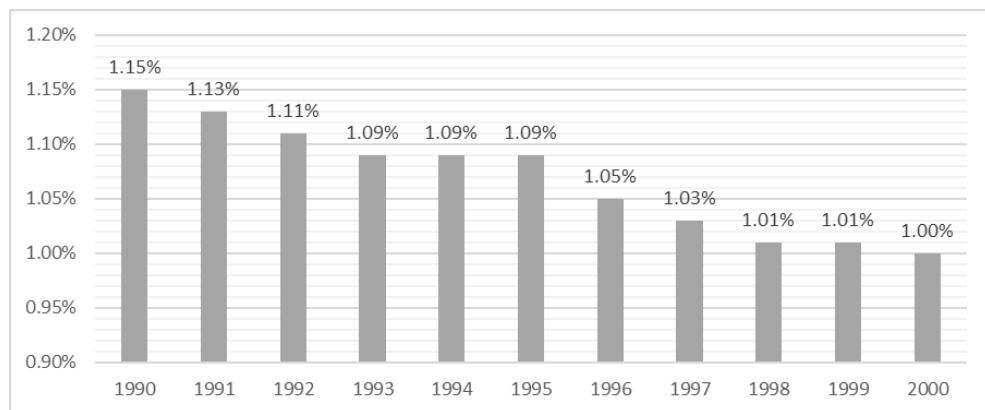
<i>Year</i>	<i>Law Students</i>	<i>Percentages</i>
1949	173	2.93%
1955	1229	6.83%
1960	1143	3.26%
1965	1654	1.94%
1970	2844	1.40%
1975	3746	1.29%
1980	4387	1.28%
1985	5349	1.25%
1990	6615	1.15%
1995	8227	1.09%
2000	10951	1.00%
2005	17978	1.39%

(Source: Compiled by the author)

The number of law majors in Taiwan grew from 6,615 in 1990 to 17,978 in 2005, indicating that more and more students were attempting to pursue careers in law since

democratisation. However, law school students still amounted to an extremely low percentage of total graduates in the 1990s; the percentage fell from 1.15% in 1990 to 1.09% in 1995, and to 1.00% in 2000. The official statistics indicate an educational tendency towards elitism amongst law schools in Taiwan – which meant that whilst a law major was the first choice of many who took the national Joint College Entrance Examination in the 1990s, only 1.076% of them were admitted to law schools.

#### 5.4 Law School Students (Percentage of Total Students), 1990-2000

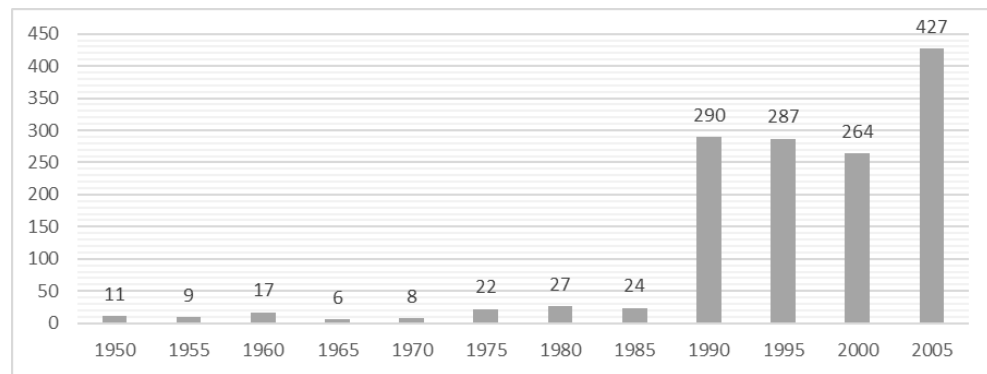


(Source: Compiled by the author)

A lawyer's license leading to the admission to practice law in Taiwan was (and still is) one of the most difficult licenses to obtain in the ROC. The reason for this is commonly understood to be due to nationalist political control over Taiwan's bar associations (Shi: Judicial Reform Foundation 15 October 2003) in the dictatorship period (1925-1990). The number of lawyers before 1990 could not be found,<sup>226</sup> although statistics show that there were 4755 lawyer licenses granted up to 2000, 1361 to 1990, 464 to 1980, 260 to 1970, 144 to 1960 and 12 to 1950 (Liu, 2005: 238-239).

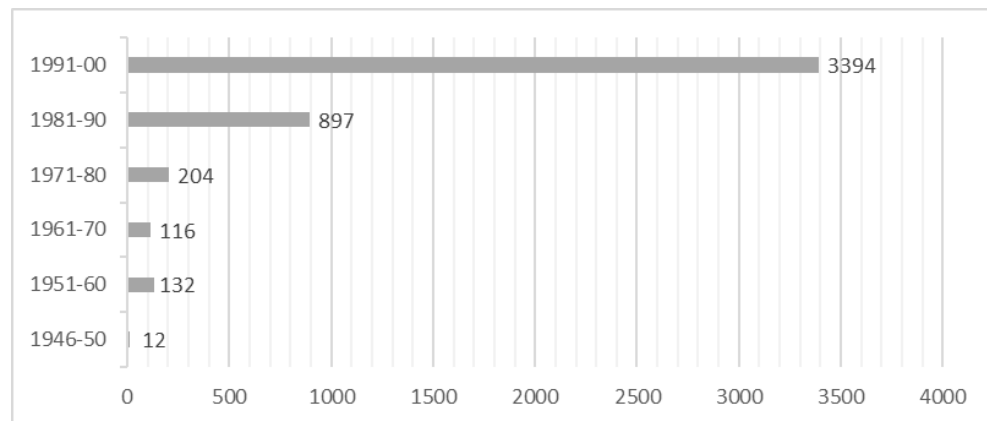
<sup>226</sup> Statistics only show how many lawyer licenses were granted before 1990. We have no idea how many license holders practiced the law before 1990 because no relevant official statistics exist.

### 5.5 Number of Lawyer Licenses Granted (per Annum), 1950-2005



(Source: Liu, Heng-Wen 2005)

### 5.6 Number of Lawyer Licenses Granted (by Decade), 1946-2000



(Source: Compiled by the author)

Table 5.6 seems incompatible with Taiwan's legal educational tendency towards elitism, because the figures indicate that Taiwan had a maximum of 1361 lawyers until democratisation in the year 1990, but 3394 lawyers were expeditiously trained during the following decade. However, the admission rate to practice law in the 1990s remained very low, especially in contrast to rates in the USA and Germany (Chen Charng-Ven: Judicial Reform Foundation 15 April 2001). In other words, the rise in admissions to practice law in the 1990s arguably echoes the common belief in Taiwan that the nationalists had attempted to control bar associations by constraining the growth

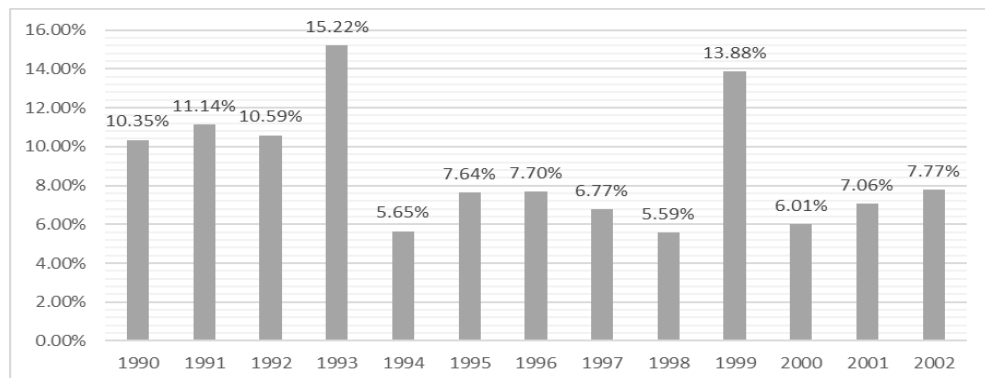
of numbers of lawyers during the pre-democratic period.

### 5.7 Admission Rate to Practice Law, 1950-2005



(Source: Compiled by the author)

### 5.8 Admission Rate to Practice Law, 1990-2002



(Source: Compiled by the author)

## 5.4 JUDICIAL YUAN: TAIWAN'S CONSTITUTIONAL COURT

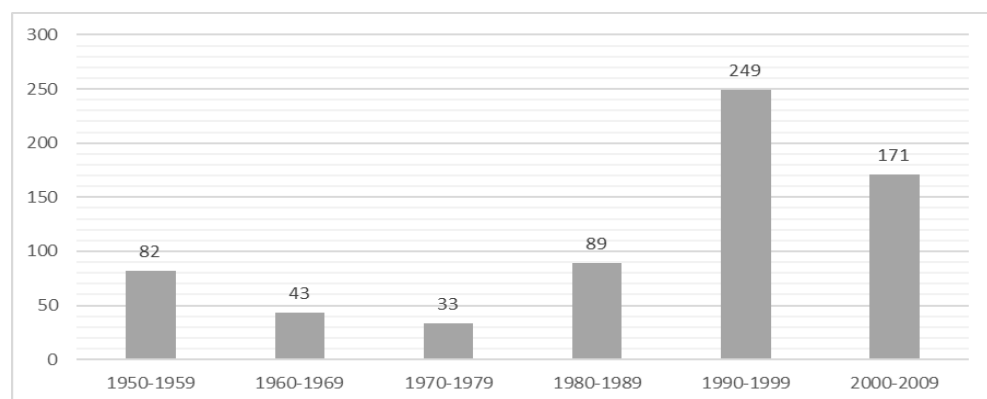
The interpretations of the Judicial Yuan shall be binding upon every institution and person in the country, and each institution shall abide by the meaning of these interpretations in handling relevant matters.<sup>227</sup>

<sup>227</sup> *Judicial Yuan Interpretation No.185* [1984] (Official Translation).

Unlike the UK Supreme Court, the Judicial Yuan is authorised by the Constitution to check-and-balance not only the government but also the congress.<sup>228</sup> It is a Hans Kelsen court (Thornhill, 2011: 291-292) which is designed to safeguard the ROC Constitution from being trampled by political careerists. As a result, the Judicial Yuan does not accept regular appeals, but only recognises unconstitutional events.<sup>229</sup> An appellant committee composed of three Justices would decide whether an appeal is accepted or not.<sup>230</sup>

In terms of the number of cases reviewed *per annum*, it is probably improper to make a comparison between the UK Supreme Court and the Judicial Yuan because of the Judicial Yuan's unique constitutional role as guardian of the constitution (Schmitt, 1931: 12-70). However, by analysing the relevant statistical data, this thesis will examine the evolution of the Judicial Yuan as Taiwan's constitutional court.

### 5.9 Number of Judicial Yuan Decisions, 1950-2009



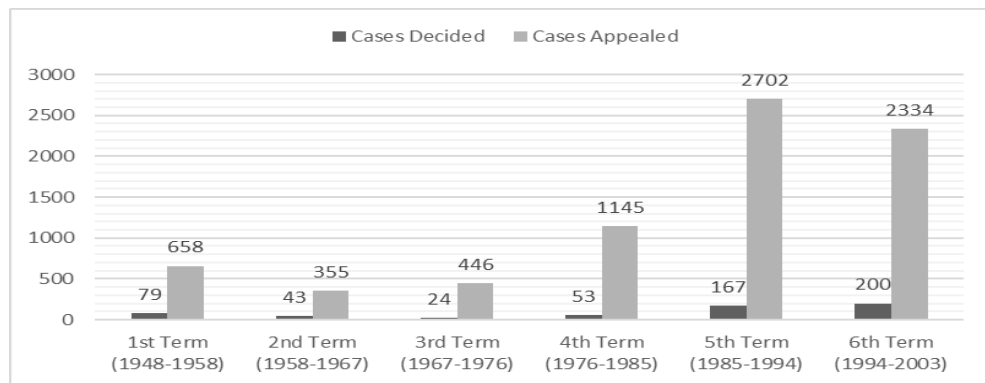
(Source: Compiled by the author)

<sup>228</sup> Constitution of R.O.C. § 78 (1947).

<sup>229</sup> Compare Act of Constitutional Interpretation Procedure § 4 (1948/93), with Act of Constitutional Interpretation Procedure § 5 (1948/93).

<sup>230</sup> Act of Constitutional Interpretation Procedure § 10 (1948/93).

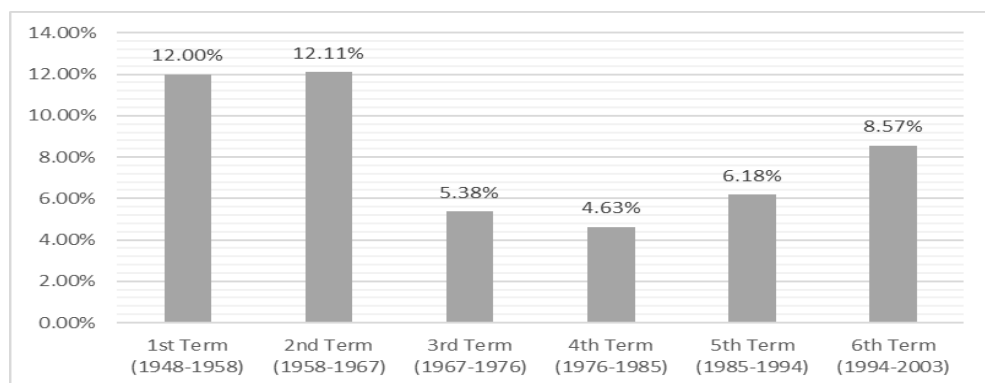
### 5.10 Number of Judicial Yuan Decisions and Appeals (per term), 1948-2003



(Source: Compiled by the author)

Tables 5.9 and 5.10 show the number of decisions the Judicial Yuan made by decade as well as by term of office over the last sixty years. In contrast to the number of appeals, it is easy to work out that on average only 8.145% of appeals were judicially reviewed between 1948 and 2003. The Justices actually decided approximately one case per month. The statistics support the aforementioned argument that the Judicial Yuan might not be an ordinary court of final appeal like the UK Supreme Court (Gillespie, 2013: 191-193; 200-202). Instead it reflects a Hans Kelsen model of constitutional court which is only responsible for explaining what the Constitution is (a dictum of Chief Justice Charles Evans Hughes).

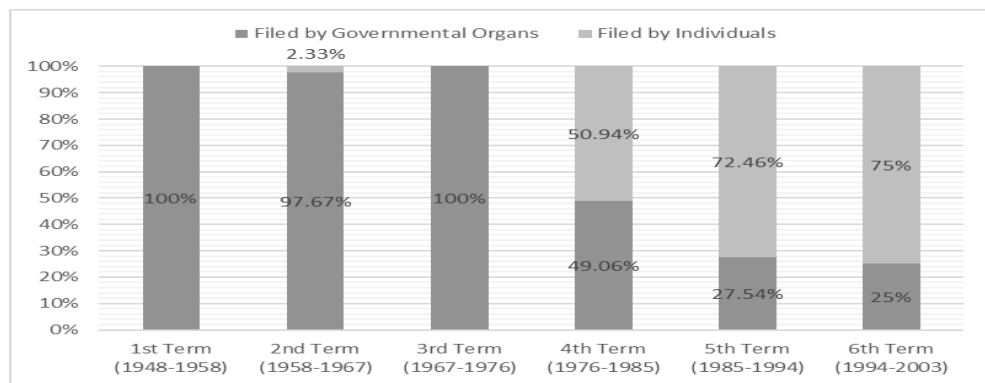
### 5.11 Percentage of Appeals Being Reviewed (per term), 1948-2003



(Source: Compiled by the author)

The political role of the Justices changed with Taiwan's democratisation, and the Judicial Yuan's changed from 'a constitutional court that served an authoritarian regime' to 'an instrument for democracy and human rights' (Ginsburg, 2003: 106). This argument can be supported by analysing the following statistical data.

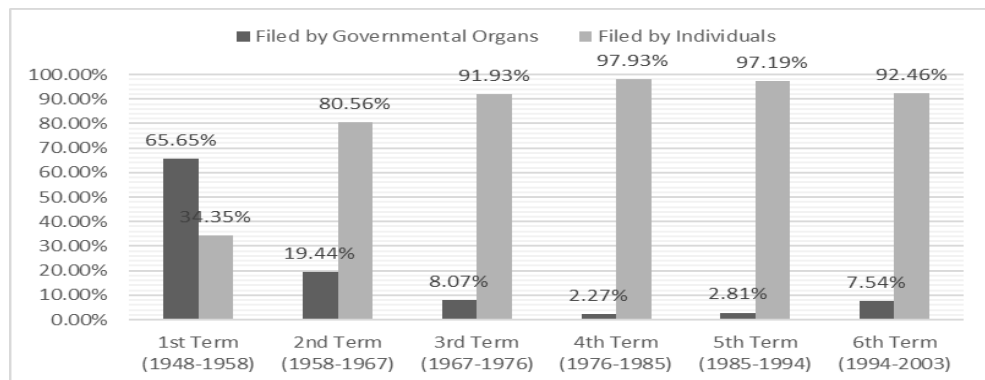
### 5.12 Classification of Cases Reviewed, 1948-2003



(Source: Compiled by the author)

Table 5.12 shows the change in judicial audience (Baum, 2006: 25-49) from governmental organs to individuals, especially in contrast to Table 5.13 below:

### 5.13 Classification of Cases Appealed, 1948-2003



(Source: Compiled by the author)

Whilst the percentage of cases filed by individuals increased from 34.35% between 1948 and 1958 to 80.56% between 1958 and 1967, and to 91.93% between 1967 and 1976, it is astonishing that Justices in the first three terms reviewed only one case within this classification.<sup>231</sup> In addition, they produced a series of outrageous records upon the protection of individual rights – the percentage was 0% between 1948 and 1958, 2.33% between 1958 and 1967, and 0% between 1967 and 1976. The aforementioned statistics support Ginsburg’s commentary on the early stage of the Judicial Yuan (Ginsburg, 2003: 106). Ginsburg concluded that the main political role of the Justices was to serve the authoritarian regime, providing constitutionality and legitimacy to the ruling Nationalist Government, and further stabilising the ROC from its failure in the Chinese Civil War:

In each era the Justices’ interpretations reflected the social needs of that [particular] time, and [these judicial reviews] often reflect the way people evaluated traditional values in those days. For example, you cannot expect a Justice not to be an anti-communist if [he or she] lived in the epoch of intense anti-communism [...] there was an inextricable link between anti-communism and Chinese cultural conservation, so the old generation Justices’ ideologies of cultural conservation naturally evoked anti-communism. As a result, [I am] afraid that the old generation of Justices could not accept a judicial review that nullified the prohibition of upholding communism, such as the *Judicial Yuan Interpretation No.644* [2008].<sup>232</sup> (Interview with Ma on 19-JUL-2013)

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<sup>231</sup> *Judicial Yuan Interpretation No.117* [1966].

<sup>232</sup> Author’s Translation.



This thesis has no intention of criticising the Justices during the first three terms, because Taiwan had been confronting crucial political challenges since the Chinese Civil War. The ROC's political leaders had attempted to retake the Chinese mainland through military operations (Chen, 2005a: 212-229) and there was undoubtedly a common consensus in Taiwan before the 1970s (Jiang, 1978: 8-9; Tang, 1997: 6-8) – although many critics argue that this so-called common consensus had been created as a matter of expediency by the Nationalist Government. According to Justice Herbert H.P. Ma, it is reasonable to expect the Justices of the first three terms to stand in line with the nationalists during a state of emergency and a period of military mobilisation against the communists because of the intensely anti-communist background. In other words, stabilising the ROC regime to eliminate the communist PRC was a priority concern for the Justices, and the communist threat has never entirely disappeared:

[Communist] Chinese Foreign Ministry Spokesman, Sun Yuxi, is reported in a PRC-owned newspaper, *Wen Wei Po*, as indicating that ‘any one, the Taiwan authorities included, who engages in “Taiwan independence” will lead Taiwan to the disaster of a war. The mainland side has explicitly stated that “Taiwan independence” means war.’ And, of course, China did use force in the 1954, 1958, and 1996 Taiwan Strait crises. In general, Chinese leaders view the use of force as a ‘normal and legitimate’ means of settling international disputes. (Payne, 2001: 132)

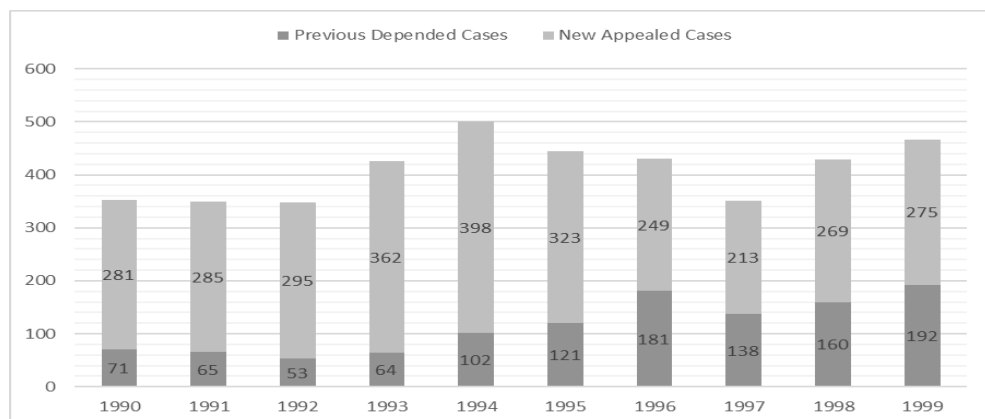
The death of Chiang Kai-Shek in 1975 symbolised the end of the ROC's military attempt to reunify China. As a direct result, the Judicial Yuan's attention moved step by step towards the protection of individual rights and democracy, and this is borne out by the statistics. For instance, the percentage of cases reviewed that focused on individual

rights protection increased from 50.94% between 1976 and 1985 to 72.46% between 1985 and 1994, and then to 75.00% between 1994 and 2003.

## 5.5 THE JUDICIAL YUAN: 1990-1999

It is commonly believed that the golden age of the Judicial Yuan was the period between 1990 and 1999, a time in which the ROC largely relied on the Judicial Yuan's decisions to solve a variety of individual rights issues as well as political controversies resulting from Taiwan's peaceful democratic transition. This argument is supported by the analysis of the pertinent official statistics summarised over the following tables.

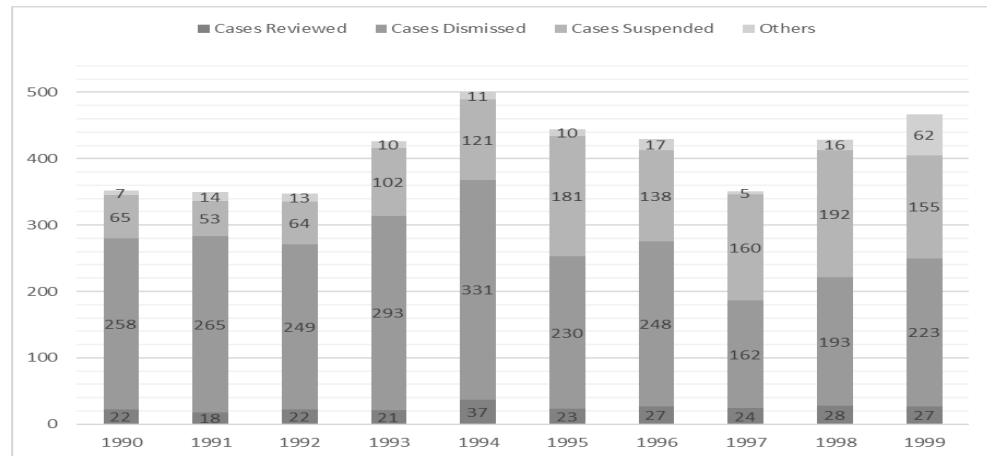
**5.14 Cases Attributed to the Judicial Yuan (per Annum), 1990-1999**



(Source: Compiled by the author)

The cases attributed to the Judicial Yuan *per annum* (Table 5.14) can be divided into cases that were not decided in the previous year, and cases appealed during the year. The reason why a case is not decided in the appellant year is not given, although it often takes a couple of years for a case to be reviewed (Lin, 1998: 46). The Judicial Yuan has three options upon an appeal – to review, to dismiss, or to suspend indefinitely.

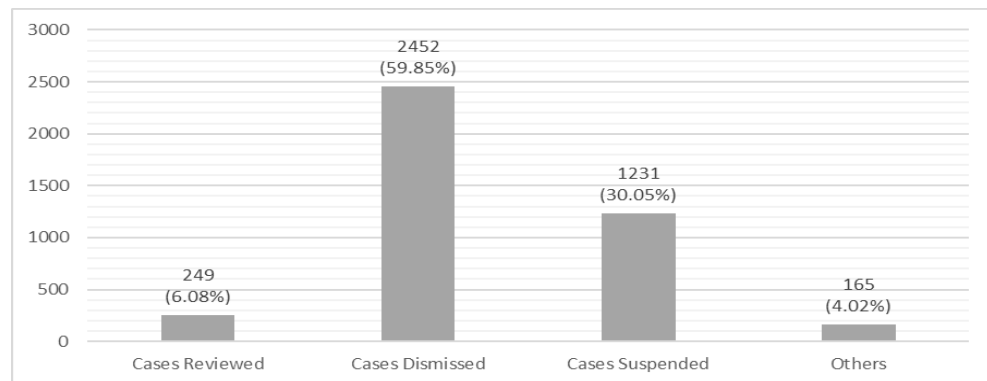
### 5.15 Disposition of Cases of the Judicial Yuan (per Annum), 1990-1999



(Source: Compiled by the author)

According to Table 5.15, only 6.08% (249 cases) of the total appeals (4097 cases) were judicially reviewed in the 1990s, whilst 59.85% (2452 cases) were dismissed and 30.05% (1231 cases) were suspended. The table implies the Justices' arbitrary use of judicial review power. An appeal might be dismissed with a reason given, or it might be suspended until the court decides whether to review it or not at a later date, or it might receive a constitutional judicial review which either approves or dismisses the case.

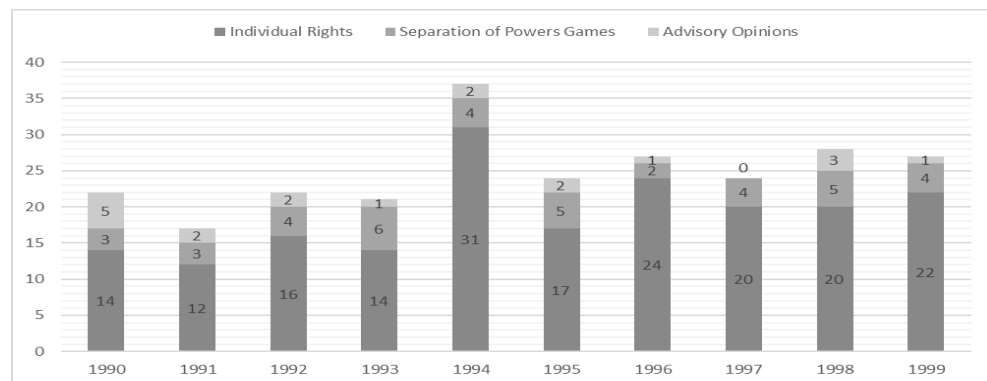
### 5.16 Disposition of Cases of the Judicial Yuan, 1990-1999



(Source: Compiled by the author)

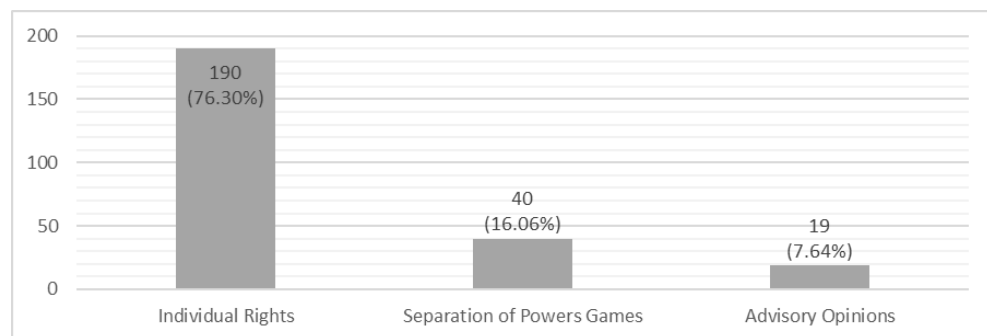
This thesis thus argues that if necessary the court could apply their disposition on cases suspended to situations requiring a strategic decision. As long as the Judicial Yuan remains entitled to make a decision at a later date – with no legally allotted timeframe and no reason given – no complaint can be made. This is tantamount to giving the Judicial Yuan the power to make no decision, or at least to avoid making decision in time. Given such circumstances, the Judicial Yuan’s disposition to review, dismiss or suspend cases lies within the court’s own adjudicative (or interpretative) power. It also reflects political power; no matter what the case is about, the timeframe and disposition of the case can be determined entirely according to the Justices’ political interests.

#### 5.17 Classification of Cases Reviewed (per Annum), 1990-1999



(Source: Compiled by the author)

#### 5.18 Classification of Cases Reviewed, 1990-1999



(Source: Compiled by the author)

Tables 5.17 and 5.18 are crucial in showing the court's preferences and attention. Given that all cases are subject to the Justices' arbitrary disposition we can see that of the cases the court reviewed in the 1990s, cases regarding individual rights apparently interested them the most, as the Justices reviewed 190 individual rights cases (76.30% of the total cases) within this decade. Meanwhile, the Justices decided 40 separation of powers controversies between state organs (16.06%), and provided 19 compulsory advisory opinions (7.64%).

It is crucial to understand that there is no consultative authority offering advisory opinions in Taiwan. This means that if a state organ seeks an advisory opinion, any decision given by the Judicial Yuan must be complied with unconditionally.<sup>233</sup> In other words, a state organ's application for an advisory opinion in Taiwan is basically a transfer of power to the Judicial Yuan. Despite this, there were still 19 advisory opinions being sought, on subjects that were as surprising as they were varied.

Another role the Judicial Yuan is obliged to play according to the Constitution<sup>234</sup> is to exercise the power of the last word, effectively giving the Judicial Yuan all the power in the event of constitutionality.<sup>235</sup> This means that anyone who attempts to challenge an act of congress or an ordinance of government within the ROC jurisdiction can only do so in front of the Justices. If, for example, the executive is not satisfied with an act of congress, or if the legislature is not pleased by an ordinance of government, one usually appeals against another under the guise of unconstitutionality (separation of powers games).

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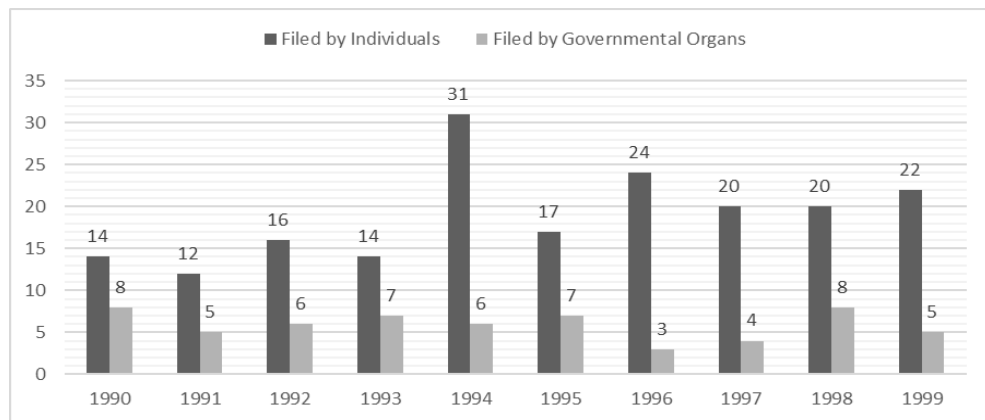
<sup>233</sup> *Judicial Yuan Interpretation No. 185* [1984].

<sup>234</sup> Compare Constitution of R.O.C. § 78 (1947), with Act of Constitutional Interpretation Procedure § 5 (1948/93), and Act of Constitutional Interpretation Procedure § 7 (1948/93).

<sup>235</sup> Compare Constitution of R.O.C. § 78 (1947), with Constitution of R.O.C. § 171 (1947), Constitution of R.O.C. § 172 (1947), and Constitution of R.O.C. § 173 (1947).

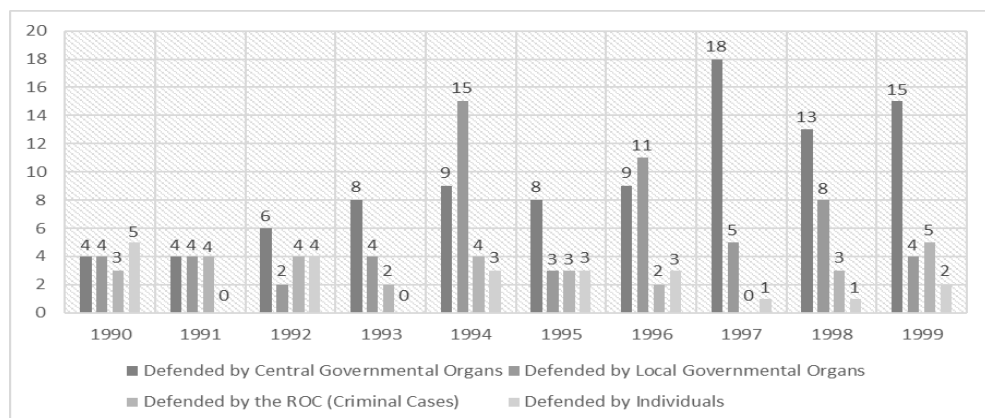
Between 1990 and 1999, there were 40 cases (16.06% of the sum) that could be categorised as separation of powers games. Like advisory opinions, the quantity of the separation of powers games cannot reflect the actual importance of these 40 cases, and therefore a series of qualitative analyses will be undertaken and discussed in detail in Chapter 7.

### 5.19 Classification of Cases Reviewed by Appellants, 1990-1999



(Source: Compiled by the author)

### 5.20 Classification of Cases Reviewed by Defendants, 1990-1999

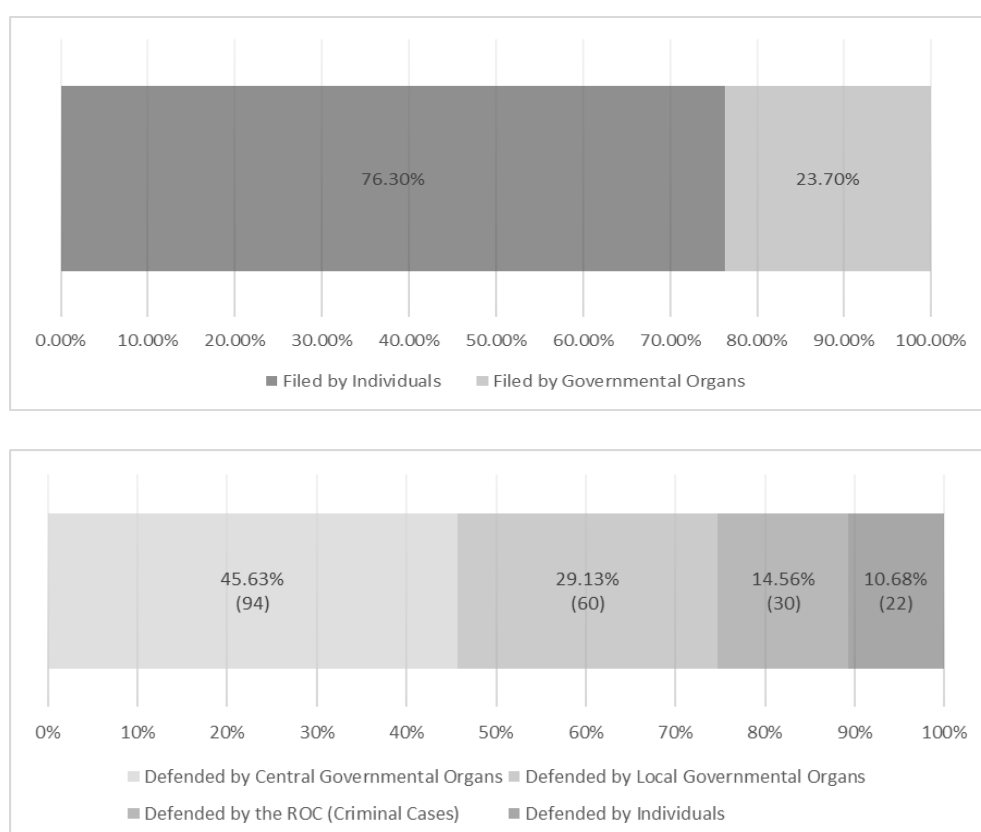


(Source: Compiled by the author)

Although statistics cannot explain the Judicial Yuan's political vicissitudes regarding

the Justices' decisions over separation of powers games and advisory opinions, statistics still show the court's political influence upon other branches of government. As Tables 5.19 and 5.20 show, 76.30% of the cases reviewed (190 cases) were filed by Taiwan's individuals in the 1990s; however, around three quarters of the defendants (74.76%) were government organs, including central (45.63%) and local (29.13%) governments. The statistics regarding appellants and defendants imply a trend that citizens in Taiwan in the 1990s considered that taking constitutional legal action against governmental organs should be a facet of individual rights protection. Such a trend can be confirmed by the rise of the administrative court system in the 1990s.

## 5.21 Classification of Cases Reviewed by Appellants and Defendants, 1990-1999

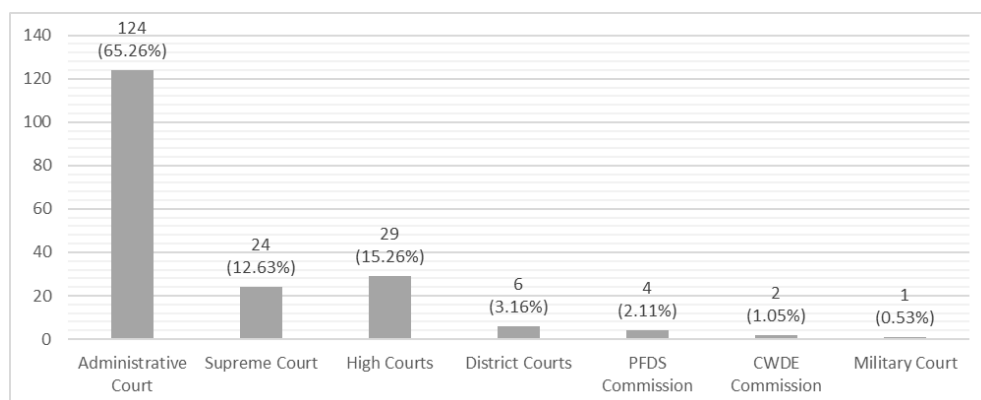


(Source: Compiled by the author)

Tables 5.22 and 5.23 particularly reflect the rise of the administrative court system in

Taiwan, catalysed directly by the Judicial Yuan:

## 5.22 Attribution of Reviewed Cases Appealed by Individuals, 1990-1999



(Source: Compiled by the author)

Of all the reviewed cases appealed by individuals between 1990 and 1999, nearly two thirds (65.26%) of the total reviewed cases (124 out of 190 cases) were appealed because of the refusal of decisions by the Administrative Court. This number shows how active and frequent administrative lawsuits were in Taiwan in the 1990s, and indicates the Justices' attention and preference regarding administrative law cases. This contrasts strongly with figures for the Supreme Court (12.63%), High Courts (15.26%) and District Courts (3.16%). Cases appealed from the Administrative Court were apparently more favourable for judicial review.

## 5.23 Attribution of Reviewed Cases Appealed by Individuals, 1990-1999

	<i>Admin.C.</i>	<i>S.C.</i>	<i>H.C.</i>	<i>D.C.</i>	<i>PFDS.</i>	<i>CWDE.</i>	<i>M.C.</i>
1990	6	4	4	0	0	0	0
1991	8	1	2	1	0	0	0
1992	7	3	6	0	0	0	0
1993	11	1	2	0	0	0	0
1994	21	4	6	0	0	0	0
1995	11	2	4	0	0	0	0



1996	17	3	1	1	2	0	0
1997	16	1	1	1	1	0	0
1998	13	2	3	1	1	0	0
1999	14	3	0	2	0	2	1
<i>Admin.C. = Administrative Court; S.C. = Supreme Court; H.C. = High Courts; D.C. = District Courts; PFDS. = Public Functionary Disciplinary Sanction Commission; CWDE. = Compensation for Wrongful Detentions and Executions Commission.</i>							

(Source: Compiled by the author)

A persuasive argument for the Justices' preference towards administrative lawsuits is that they reflect the conservative nature of the Administrative Court, earning the Administrative Court the nickname 'the Court of Losing Cases' (Nownews Network: NOW News 17 June 2013). Justice Wu Geng recalled the attribution of appealed cases in the Judicial Yuan, stating:

As to the cases [I] confronted in the Council of Justices, administrative lawsuits amounted to 70% to 80% [of total cases appealed] and constitutional lawsuits were about 10% to 20%. Cases regarding either civil or criminal issues were very few.<sup>236</sup> (Interview with Wu on 19-OCT-2004)

Despite the impact of the 'Court of Losing Cases', which would result in a large amount of appellate administrative lawsuits in the Judicial Yuan, Taiwan's democratisation resulted in many necessary constitutional and administrative law reforms that needed to be adjusted to make the legal system more democratically relevant (democratisation in the realm of law). Justice Wu Geng said:

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<sup>236</sup> Author's Translation.

I was commissioned a Justice for two terms [from 1985 to 2003] and was involved with [Taiwan's] constitutional judicial review for 18 years. Moreover, the era of my participation a period in which [our] domestic environment was experiencing a dramatic political and economic transition, [and thus] the institutional function of the Judicial Yuan' constitutional judicial review was in very high demand. It was also an epoch in which the Justices' constitutional judicial review could be further developed.<sup>237</sup> (ibid)

In addition to administrative lawsuits, the foundation and the rise of the constitutional leapfrog procedure was also developed in the 1990s in accordance with *Judicial Yuan Interpretation No.371* [1995]:

[S]ince the Constitution's authority is higher than the statute's, judges have the obligation to obey the Constitution over any other statutes. Therefore, in trying a case where a judge, with reasonable assurance, has suspected that the statute applicable to the case is unconstitutional, he shall surely be allowed to petition for interpretation of its constitutionality. In the abovementioned situation, judges of different levels may suspend the pending procedure on the ground that the constitutionality of the statute is a prerequisite issue. At the same time, they shall provide concrete reasons for objectively believing the unconstitutionality of the statute, and petition to the Grand Justices of the Yuan to interpret its constitutionality.<sup>238</sup>

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<sup>237</sup> Author's Translation.

<sup>238</sup> *Judicial Yuan Interpretation No.371* [1995] (Official Translation).

### 5.24 Constitutional Leapfrog Appeals, 1990-1999

COURT	CASES	YEAR
District Courts, Taipei and Shilin	<i>Interpretation No.384</i>	<b>1995</b>
District Court, Taichung	<i>Interpretation No.392</i>	<b>1995</b>
District Courts, Hualien and Changhua	<i>Interpretation No.471</i>	<b>1998</b>
District Court, Taipei	<i>Interpretation No.475</i>	<b>1999</b>
District Court, Taipei	<i>Interpretation No.476</i>	<b>1999</b>
District Court, Taipei	<i>Interpretation No.477</i>	<b>1999</b>

(Source: Compiled by the author)

*Judicial Yuan Interpretation No.371* [1995] arose from the Judicial Yuan's proposal to authorise all inferior courts the power of constitutional judicial review, something which greatly displeased the Legislative Yuan:

The Legislators of this Yuan [...] doubt the judicial opinion approved by the Judicial Yuan that 'a court shall be authorised the power of constitutional judicial review at trial and to decline the application of the law thereon if an unconstitutional opinion is held'. They allege that it would be incompatible with Articles 80 and 170 of the Constitution if the 'power of substantive constitutional judicial review' was given to ordinary judges [at different levels]. Such an action would cause a [constitutional and political] controversy regarding [both] the legitimacy as well as authority of the Constitutional Interpreter [of the Republic of China on a basis of the regulations provided by] Articles 171 and 173 of

the Constitution, Article 3 of the Organic Act of Judicial Yuan 1947/92 and Articles 2 and 3 of the Act of Constitutional Interpretation Procedure 1948/58. Therefore, to safeguard the constitutional judicial review system, protect the stability of the law from [arbitrary] depredation, [and further] show respect to the legislative power held by the Legislative Yuan, [we the Legislators] hereby appeal to the Judicial Yuan for an interpretation. [...] Your Lordships, please kindly determine right from wrong.<sup>239</sup> (Instrument of Appeal on 30-JUN-1992)

The instrument of appeal submitted by the Legislative Yuan indicates that:

1. It was originally the Judicial Yuan's intention to authorise the power of substantive constitutional judicial review to ordinary judges, namely that the Judicial Yuan attempted to promote the American judicial review model (Wolfe, 1994: 17-120) in Taiwan.
2. The American judicial review model was considered a political menace to the legislative power, so the Legislative Yuan protested against this proposal through appeal (soft political admonition).

In the end the Judicial Yuan strategically withdrew from its original proposal, adopting a constitutional leapfrog procedure promoted by Chief Justice Weng Yueh-Sheng (Weng, 1994: 400-402), according to which the substantive constitutional review power defined by the Legislative Yuan was successfully given (albeit indirectly) to Taiwan's

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<sup>239</sup> Author's Translation.

ordinary judges (ibid: 401) through *Judicial Yuan Interpretation No.371* [1995], with no additive political burden – because the Legislators remained unaware of the leapfrog mechanism:

This constitutional leapfrog procedure system has [...] merits. [...] [Ordinary] judges' constitutional judicial review power is affirmed and the [political] status of judges shall therefore be raised [...] <sup>240</sup> (ibid)

Since *Judicial Yuan Interpretation No.371* [1995] was promulgated on 20 January 1995, six constitutional judicial reviews had been appealed through the constitutional leapfrog procedure in the 1990s, all of which were appealed by district court judges. Although the total number of leapfrog appeals is few, they remain crucial to Taiwan's constitutional development in qualitative terms. The procedures also demonstrated the success of the leapfrog process during the 1990s, especially considering the fact that all the appellants were district court judges who reviewed cases 'substantively' during the trials and decided to appeal under their own judicial authority. It was obviously a victory for judicial power expansion.

### 5.25 Constitutional Leapfrog Appeals, 1990-1999

CASES	ISSUES	W/L
<i>Interpretation No.384</i>	Criminal Law (Due Process of Law)	<b>Win</b>
<i>Interpretation No.392</i>	Criminal Law (A Writ of <i>Habeas Corpus</i> )	<b>Win</b>
<i>Interpretation No.471</i>	Criminal Law (Principle of Proportionality)	<b>Win</b>
<i>Interpretation No.475</i>	Cross-Strait Relations (National Debt)	<b>Lose</b>

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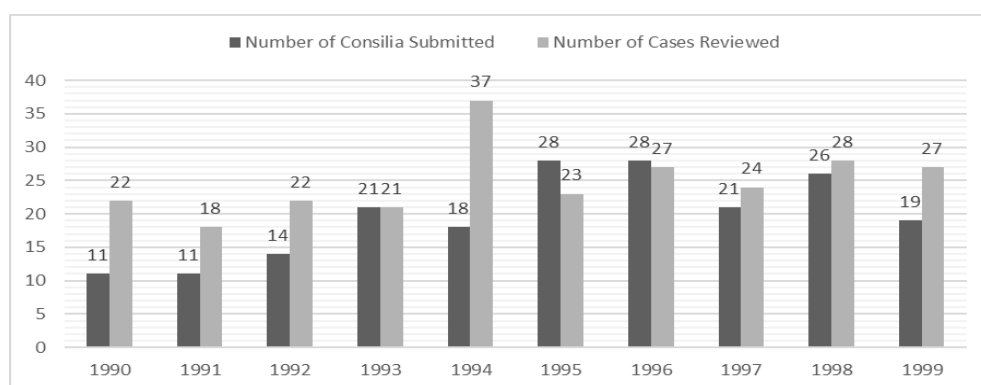
<sup>240</sup> Author's Translation.

<i>Interpretation No.476</i>	Criminal Law (Capital Punishment)	<b>Lose</b>
<i>Interpretation No.477</i>	Compensation (Democratic Transition)	<b>Win</b>

(Source: Compiled by the author)

The constitutional leapfrog appeal has been developed further since the 1990s, and the system of *Consilia* (legal opinion) had also been greatly enhanced during the decade.

### 5.26 Number of *Consilia* Submitted and Cases Reviewed, 1990-1999

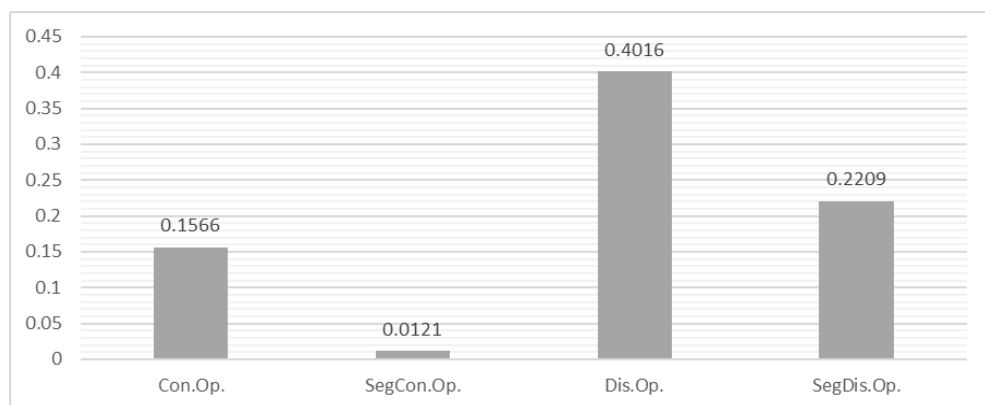


(Source: Compiled by the author)

Table 5.26 shows that the Justices submitted 197 *consilia* in the 1990s, alongside the 249 cases reviewed by the Judicial Yuan. In other words, there were 0.7912 *consilia* submitted per case on average, including 0.1566 concurring opinions (39 in total), 0.4016 dissenting opinions (100 in total), 0.0121 segmental concurring opinions (3 in total) and 0.2209 segmental dissenting opinions (55 in total) submitted per case on average. The sum of dissenting and segmental dissenting opinions is 155 *consilia*, which means that one Justice opposed to the majority opinion every 1.61 cases on average. This figure indicates the difficulties facing judicial decision-making during Taiwan's judicial review, as supported by the following quote by Justice Herbert H.P. Ma:

Another reason is what was happening in reality. In our period, it was not that easy to find enough Justices to stand for [a majority opinion and thereby] pass a constitutional judicial review. If [any Justice] wrote a dissenting opinion, it meant that the majority opinion would have one more veto. Under such circumstances, I considered that the most important thing was to allow the case to be passed by the Justices' supermajority vote (Pre-1993 this was 3 out of 4; Post-1993 it was 2 out of 3). In order to help cases to pass the supermajority vote, I wrote no dissenting opinion, even though I had a dissenting opinion. Of course, there will always be someone who disagrees with my viewpoint; [however, I think that] it is not at all acceptable at an institutional level if the Justices constantly suspend judgements for lengthy periods.<sup>241</sup> (Interview with Ma on 19-JUL-2013)

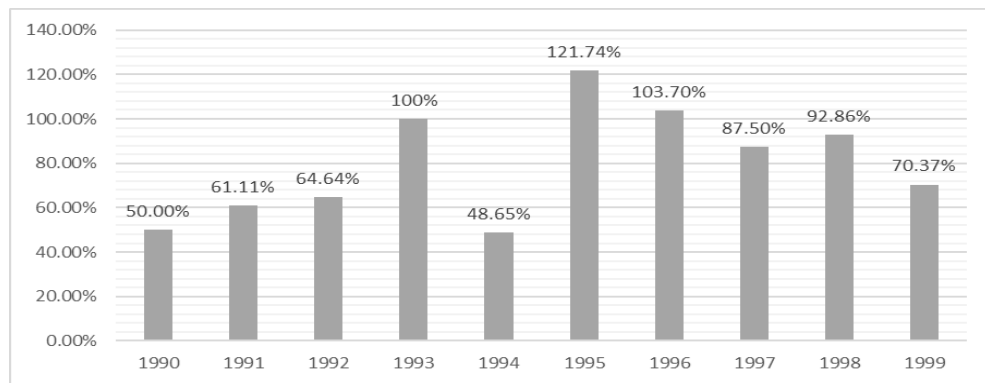
### 5.27 Number of *Consilia* Submitted per Case Reviewed, 1990-1999



(Source: Compiled by the author)

<sup>241</sup> Author's Translation.

### 5.28 Percentage of *Consilia* Submitted per Case Reviewed, 1990-1999



(Source: Compiled by the author)

According to the Act of Constitutional Interpretation Procedure 1948/58 and 1948/93, the quorum for passing a constitutional judicial review before 1993 was three out of four, and after 1993 two out of three.

It requires a majority of three-fourths of the Justices present at a session having a quorum of three-fourths of total number of the Justices for passing an interpretation of the Constitution.<sup>242</sup>

It requires a majority of two-thirds of the Justices present at a session having a quorum of two-thirds of total number of the Justices for passing an interpretation of the Constitution. However, only more than one-half of the Justices present at the same session is required for declaring a regulation or ordinance unconstitutional.<sup>243</sup>

Article 13I of the Act of Constitutional Interpretation Procedure 1948/58 confirms Justice Herbert H.P. Ma's scruples about the completion of constitutional judicial

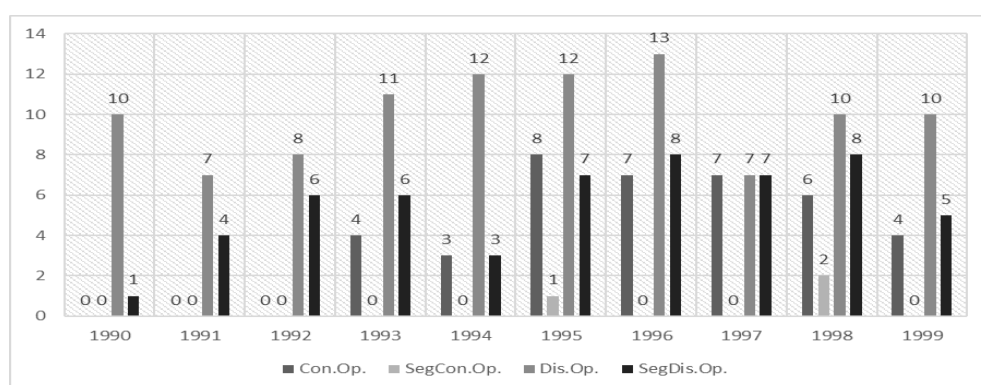
<sup>242</sup> Act of Constitutional Interpretation Procedure § 13I (1948/58) (Official Translation).

<sup>243</sup> Act of Constitutional Interpretation Procedure § 14I (1948/93) (Official Translation).



review. It was difficult to pass a constitutional judicial review if there were too many dissenting or segmental dissenting opinions submitted because of the three-fourths supermajority rule; however, there were still 36 *consilia* (62 cases reviewed) submitted between 1990 and 1992, along with 25 dissenting opinions and 11 segmental dissenting opinions, meaning that for each case reviewed there were 0.4032 dissenting opinions and 0.1774 segmental dissenting opinions.

### 5.29 Number of *Consilia* Submitted (per Annum), 1990-1999



(Source: Compiled by the author)

The statistics also show that there were more and more *consilia* submitted after 1993, resulting from the amendment of the Act of Constitutional Interpretation Procedure 1948/93. The quorum for passing a judicial review became two-thirds of total number of Justices,<sup>244</sup> instead of the quorum of three-fourths.<sup>245</sup> What is noteworthy about the change in the quorum is that the new Act of Constitutional Interpretation Procedure 1948/1993 was actually drafted directly by the fifth-term (1985-1994) Justices through the Justices' Council (8 meetings moderated by Justices Herbert H.P. Ma and Chang Cheng-Tao between 1 July and 7 August 1992) (ROC Judicial Yuan, 1998: 228-274). It

<sup>244</sup> Id.

<sup>245</sup> Act of Constitutional Interpretation Procedure § 13I (1948/58).

is therefore possible to speculate that it was the Justices' deliberation that changed the quorum for passing a constitutional judicial review:

In contrast to legislation in the United States, Japan, Germany and Austria, the original Act [...] that regulated a quorum of three-fourths of the total number of Justices for passing a constitutional interpretation turned out to be proportionally too difficult. In the reality, there were many cases where determination was difficult because of the persistence of minority Justices [...] <sup>246</sup> (ibid: 256-257)

## **5.6 THE HONOURABLE JUSTICES: 1990-1999**

A total of 31 Justices served in the ROC Judicial Yuan between 1990 and 1999, 15 of whom were fifth-term Justices between 1985 and 1994, and 19 of whom were sixth-term Justices between 1994 and 2003. The total number that comprised the Justices' Bench was between 14 and 16, though the maximum quorum in the 1990s was actually 17.<sup>247</sup>

The fifth-term Justices served until 1 October 1994, deciding Taiwan's judicial reviews between *Judicial Yuan Interpretation No.250* [1990] and *Judicial Yuan Interpretation No.366* [1994] (117 cases in total). There were originally 15 fifth-term Justices term, but Justice Yang Zu-Zan passed away from cancer on 14 July 1994, leaving only 14 fifth-term Justices between 14 July and 1 October 1994. Justice Yang Zu-Zan's final judicial decision was made in *Judicial Yuan Interpretation No.350* [1994] on 3 June

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<sup>246</sup> Author's Translation.

<sup>247</sup> Organic Act of Judicial Yuan § 3 (1947/80); Organic Act of Judicial Yuan § 3 (1947/92).

1994, only 41 days before his death. Justice Yang served his fatherland honourably until his final moment.

### 5.30 List of Fifth-Term Justices and Their Terms of Office

JUSTICE	TERM OF OFFICE	
<i>WENG Yueh-Sheng</i>	13.07.1972 01.10.2003	31.01.1999 30.09.2007
<i>CHAI Shau-Hsien</i>	02.10.1976	01.10.1994
<i>YANG Yu-Ling</i>	02.10.1976	01.10.1994
<i>LEE Chung-Sheng</i>	10.06.1982	01.10.1994
<i>YANG Chien-Hua</i>	10.06.1982	01.10.1994
<i>YANG Zu-Zan</i>	10.06.1982	14.07.1994
<i>Herbert Han-Pao Ma</i>	10.06.1982	01.10.1994
<i>LIU Tieh-Cheng</i>	02.10.1985	30.09.2003
<i>CHENG Chien-Tsai</i>	02.10.1985	01.10.1994
<i>WU Geng</i>	02.10.1985	30.09.2003
<i>SHIH Shen-An</i>	02.10.1985	01.10.1994
<i>CHEN Rui-Tang</i>	02.10.1985	01.10.1994
<i>CHANG Cheng-Tao</i>	02.10.1985	01.10.1994
<i>CHANG Teh-Sheng</i>	02.10.1985	01.10.1994
<i>LEE Chih-Peng</i>	02.10.1985	01.10.1994

(Source: Compiled by the author)

The sixth-term Justices served between 2 October 1994 and 30 September 2003, deciding Taiwan's judicial reviews between *Judicial Yuan Interpretation No.367* [1994] and *Judicial Yuan Interpretation No.498* [1999] (132 cases in total). There were originally 16 sixth-term Justices, including 3 fifth-term Justices (Justices Weng Yueh-Sheng, Liu Tieh-Cheng and Wu Geng). However, Justice Lin Kuo-Hsien ceased to be a Justice and became Secretary-General of the Judicial Yuan from 18 March 1997, while Justice Cheng Chung-Mo resigned his commission to become Justice Minister on 15 July 1998. Justice Weng Yueh-Sheng suspended his position on the bench between 1

February 1999 and 30 September 2003 as a result of his appointment as Head of the Judicial Yuan<sup>248</sup>, so Justices Hwang Yueh-Chin, Lai In-Jaw and Hsieh Tsay-Chuan were commissioned to fill the three vacancies on 1 February 1999.

### 5.31 List of Sixth-Term Justices and Their Terms of Office

JUSTICE	TERM OF OFFICE	
<i>WENG Yueh-Sheng</i>	13.07.1972	31.01.1999
	01.10.2003	30.09.2007
<i>LIU Tieh-Cheng</i>	02.10.1985	30.09.2003
<i>WU Geng</i>	02.10.1985	30.09.2003
<i>WANG Ho-Hsiung</i>	02.10.1994	30.09.2007
<i>WANG Tze-Chien</i>	02.10.1994	30.09.2003
<i>LIN Young-Mou</i>	02.10.1994	30.09.2007
<i>LIN Kuo-Hsien</i>	02.10.1994	17.03.1997
Vincent <i>SZE</i>	02.10.1994	30.09.2003
<i>CHENG Chung-Mo</i>	02.10.1994	14.07.1998
	01.10.2003	06.04.2006
<i>SUN Sen-Yen</i>	02.10.1994	30.09.2003
<i>CHEN Chi-Nan</i>	02.10.1994	30.09.2003
<i>TSENG Hua-Sun</i>	02.10.1994	30.09.2003
<i>TUNG Hsiang-Fei</i>	02.10.1994	30.09.2003
<i>YANG Huey-Ing</i>	02.10.1994	30.09.2003
<i>TAI Tong-Schung</i>	02.10.1994	30.09.2003
<i>SU Jyun-Hsiung</i>	02.10.1994	30.09.2003
<i>HWANG Yueh-Chin</i>	01.02.1999	30.09.2003
<i>LAI In-Jaw</i>	01.02.1999	05.10.2000
	01.10.2003	12.10.2010
<i>HSIEH Tsay-Chuan</i>	01.02.1999	12.10.2010

(Source: Compiled by the author)

<sup>248</sup> Before 1 October 2003, the Head of the Judicial Yuan was a political appointee but not a Justice, even though most of them were famous jurists in Taiwan. The Additional Articles of the Constitution 1997 terminated the above system and stipulated that from 2003 the Head of the Judicial Yuan shall be the Chief Justice, decreasing the quorum of Justices to 15. Constitution of R.O.C. amend. § 5 (1991/1997).

### 5.32 Number of Justices in Total, 1990-1999

DURATION AND INTERPRETATIONS	JUSTICES
01.01.1990 – 14.07.1994 (Interpretation No.250 – Interpretation No.357)	15
15.07.1994 – 01.10.1994 (Interpretation No.358 – Interpretation No.366)	14
02.10.1994 – 17.03.1997 (Interpretation No.367 – Interpretation No.422)	16
18.03.1997 – 14.07.1998 (Interpretation No.423 – Interpretation No.460)	15
15.07.1998 – 31.01.1999 (Interpretation No.461 – Interpretation No.476)	14
01.02.1999 – 31.12.1999 (Interpretation No.477 – Interpretation No.498)	16

(Source: Compiled by the author)

Tables 5.30 to 5.32 show not only the size of the full bench of the Judicial Yuan in the 1990s (Table 5.32), but also the Justices' signatures in sequence – the thesis discovers that Justices never subscribed to a constitutional judicial review beyond the aforementioned order. Moreover, by cross-checking the Justices' signatures across all of the judicial reviews, this thesis also successfully notes the absence of some Justices and the proper size of the bench in each case:

### 5.33 List of Absent Justices per Case, 1990-1999

CASE	ABSENCE
<b>FIFTH TERM JUSTICES</b> (01.01.1990 – 01.10.1994)	
<b>No.259</b>	H.H.P. Ma
<b>No.260</b>	H.H.P. Ma
<b>No.262</b>	Cheng C.T. and Shih S.A.

<b>No.263</b>	Yang C.H. and Shih S.A.
<b>No.264</b>	Yang C.H. and Shih S.A.
<b>No.267</b>	Chang T.S.
<b>No.271</b>	Lee C.S., Shih S.A. and Lee C.P.
<b>No.272</b>	Weng Y.S. and Chai S.H.
<b>No.273</b>	Weng Y.S. and H.H.P. Ma
<b>No.274</b>	Weng Y.S.
<b>No.278</b>	Chen R.T.
<b>No.279</b>	Chen R.T.
<b>No.280</b>	H.H.P. Ma and Shih S.A.
<b>No.282</b>	H.H.P. Ma and Lee C.P.
<b>No.290</b>	H.H.P. Ma
<b>No.295</b>	Yang C.H.
<b>No.296</b>	Yang C.H.
<b>No.299</b>	H.H.P. Ma
<b>No.300</b>	Lee C.S.
<b>No.301</b>	Lee C.S. and Shih S.A.
<b>No.302</b>	Lee C.S., Cheng C.T. and Chen R.T.
<b>No.303</b>	Lee C.S., Cheng C.T. and Chen R.T.
<b>No.304</b>	Lee C.S., Cheng C.T. and Chen R.T.
<b>No.306</b>	Chai S.H.
<b>No.307</b>	Chang C.T.
<b>No.312</b>	Yang Y.L., Yang C.H. and H.H.P. Ma
<b>No.319</b>	H.H.P. Ma and Chang T.S.
<b>No.320</b>	Chang T.S.

<b>No.321</b>	Chang T.S.
<b>No.322</b>	Chang T.S.
<b>No.323</b>	Chang T.S.
<b>No.338</b>	H.H.P. Ma
<b>No.339</b>	H.H.P. Ma
<b>No.340</b>	H.H.P. Ma
<b>No.341</b>	Yang Z.Z.
<b>No.342</b>	Lee C.P.
<b>No.351</b>	Yang Z.Z.
<b>No.352</b>	Yang Z.Z.
<b>No.353</b>	Yang Z.Z. and Shih S.A.
<b>No.354</b>	Yang Z.Z. and Shih S.A.
<b>No.355</b>	Yang Z.Z. and Shih S.A.
<b>No.356</b>	Yang Z.Z.
<b>No.357</b>	Yang Z.Z.
<b>No.362</b>	Yang C.H. and H.H.P. Ma
<b>No.363</b>	Yang C.H. and H.H.P. Ma
<b><i>SIXTH TERM JUSTICES</i></b> (02.10.1994 – 31.12.1999)	
<b>No.368</b>	Liu T.C.
<b>No.369</b>	Yang H.I.
<b>No.370</b>	Liu T.C.
<b>No.372</b>	Yang H.I.
<b>No.373</b>	Yang H.I.
<b>No.382</b>	Lin Y.M., V. Sze, Chen C.N. and Tung H.F.

<b>No.383</b>	Lin Y.M.
<b>No.384</b>	Chen C.N.
<b>No.386</b>	Wang T.C.
<b>No.387</b>	Lin Y.M.
<b>No.389</b>	Sun S.Y., Chen C.N. and Tai T.S.
<b>No.390</b>	Sun S.Y., Chen C.N. and Tai T.S.
<b>No.397</b>	Chen C.N. and Tseng H.S.
<b>No.398</b>	Chen C.N.
<b>No.401</b>	V. Sze
<b>No.412</b>	Lin Y.M., Chen C.N. and Tung H.F.
<b>No.413</b>	Tseng H.S.
<b>No.414</b>	Wang T.C.
<b>No.415</b>	Wang T.C.
<b>No.420</b>	Tung H.F.
<b>No.425</b>	Chen C.N.
<b>No.426</b>	Sun S.Y.
<b>No.427</b>	Sun S.Y.
<b>No.432</b>	Weng Y.S., Liu T.C. and Wang H.H.
<b>No.435</b>	Lin Y.M.
<b>No.436</b>	Liu T.C.
<b>No.438</b>	Wang H.H.
<b>No.439</b>	Wang H.H.
<b>No.441</b>	Chen C.N. and Tseng H.S.
<b>No.444</b>	Lin Y.M.
<b>No.445</b>	Su J.H.

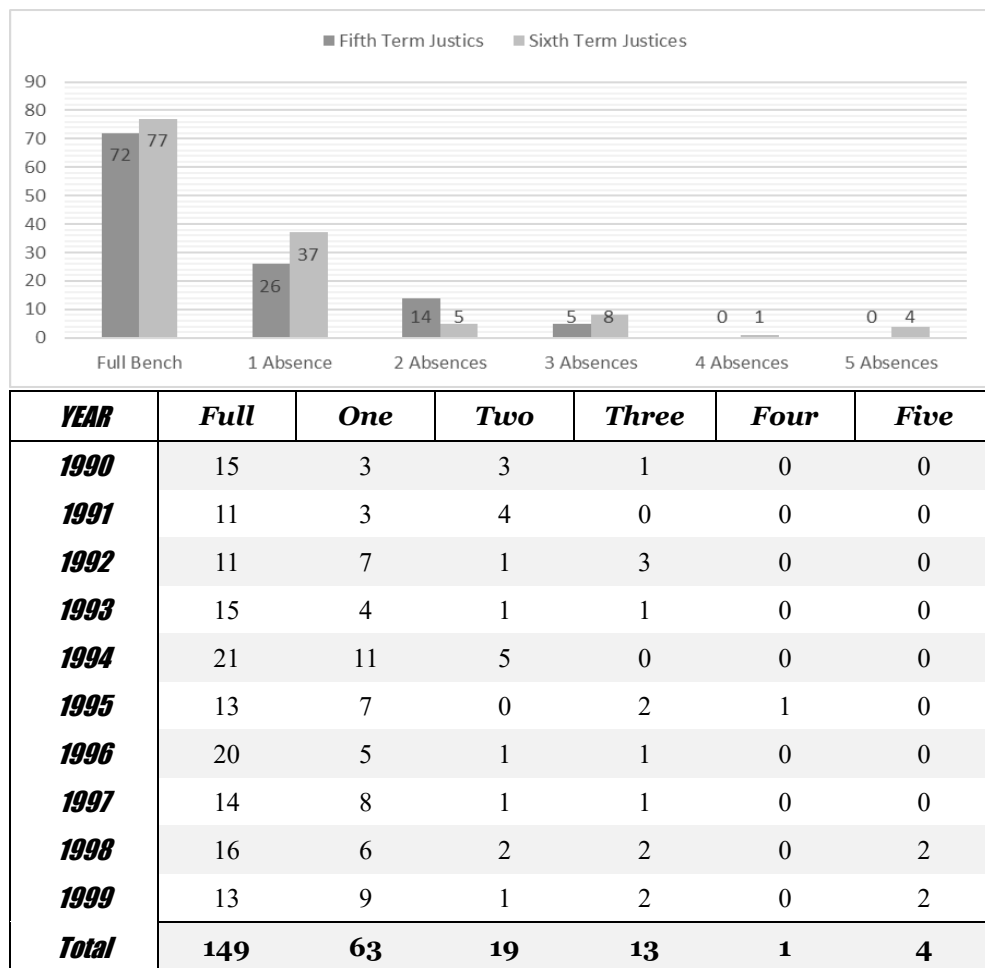


<b>No.447</b>	Cheng C.M. and Tai T.S.
<b>No.454</b>	Lin Y.M. and Tai T.S.
<b>No.455</b>	V. Sze, Chen C.N. and Tung H.F.
<b>No.456</b>	V. Sze, Chen C.N. and Tung H.F.
<b>No.457</b>	Lin Y.M.
<b>No.458</b>	Weng Y.S., Wang T.C., Lin Y.M., Sun S.Y. and Tseng H.S.
<b>No.459</b>	Weng Y.S., Wang T.C., Lin Y.M., Sun S.Y. and Tseng H.S.
<b>No.461</b>	Chen C.N.
<b>No.462</b>	Lin Y.M.
<b>No.471</b>	Wang H.H.
<b>No.478</b>	Wang T.C.
<b>No.479</b>	Wang T.C. and Su J.H.
<b>No.480</b>	V. Sze, Sun S.Y., Chen C.N., Tung H.F. and Hwang Y.C.
<b>No.481</b>	V. Sze, Sun S.Y., Chen C.N., Tung H.F. and Hwang Y.C.
<b>No.483</b>	Tai T.S., Lai I.J. and Hsieh T.C.
<b>No.484</b>	Tai T.S., Lai I.J. and Hsieh T.C.
<b>No.485</b>	Tai T.S.
<b>No.486</b>	Liu T.C.
<b>No.487</b>	Su J.H.
<b>No.488</b>	I.J. Lai
<b>No.489</b>	Lai I.J.
<b>No.490</b>	Wang T.C.
<b>No.491</b>	Wang T.C.
<b>No.498</b>	Tai T.S.

(Source: Compiled by the author)

Table 5.33 shows that out of 249 cases in the 1990s, 100 cases (40.16%) were reviewed by judicial panel from which at least one Justice was absent. There were 149 cases (59.84%) reviewed *en banc*, including 72 out of 117 (61.54%) reviewed by the fifth-term Justices, and 77 out of 132 cases (58.33%) reviewed by the sixth-term Justices. It is likely that the Justices preferred to make crucial decisions *en banc* in the 1990s, because there no exception can be found in which the Justices reviewed a critical and sensitive case without a full bench.

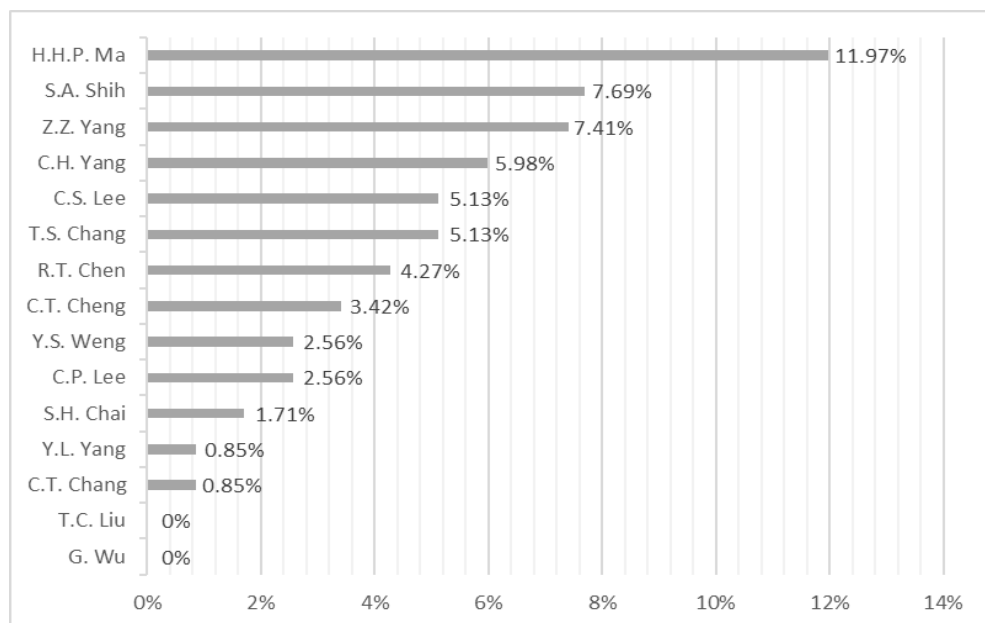
#### 5.34 Number of Cases Reviewed According to Bench Sizes, 1990-1999



(Source: Compiled by the author)

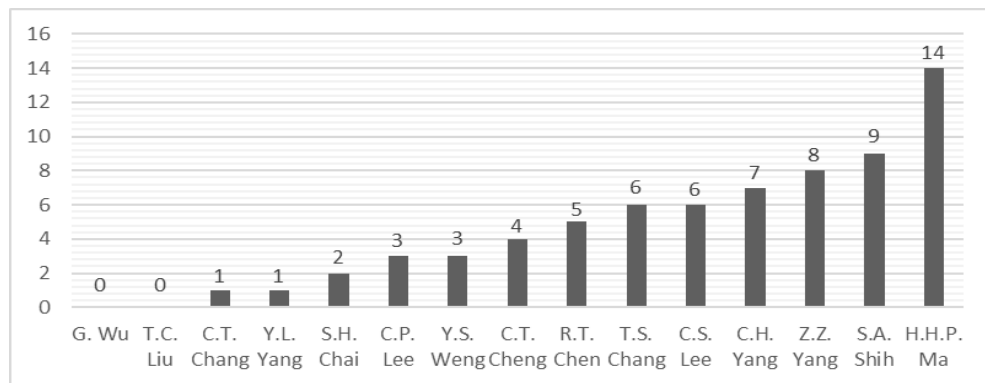
There is no clear evidence to show that any of the Justices attempted to avoid reviewing a particular case in the 1990s, so the Justices' absences listed above do not seem to be at all unusual. Most of the Justices' absences were continuous instead of intermittent, and are more likely to be due to holidays, illness or institutional errands. Evidence shows that Justices might have been concerned about specific cases despite the fact that they were actually absent. In *Judicial Yuan Interpretation No.389* [1995], for example, Justice Tai Tong-Schung and Justice Su Jyun-Hsiung submitted a co-dissenting opinion to the Judicial Yuan, even though they were absent according to the official record (Judicial Yuan Gazettes Vol.37 No.12, 1995: 1-3). Statistics also reveal that the Justices always made crucial decisions *en banc* in the 1990s, so it is reasonable to speculate that there was a sense of unanimity amongst the Justices, and they would all admit political accountability together. It was a Nash equilibrium, from which none of them could avoid responsibility if the decision was made *en banc*.

### 5.35 Absence Rate of the Fifth-Term Justices, 1990-1994



(Source: Compiled by the author)

### 5.36 Number of Absences from Judicial Reviews (per Justices), 1990-1994



(Source: Compiled by the author)

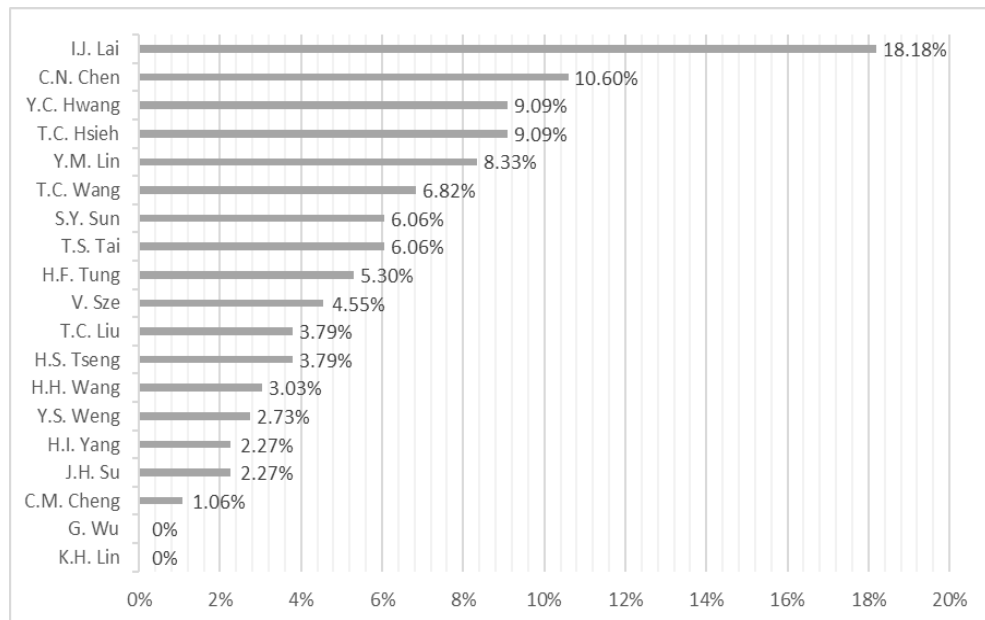
Tables 5.35 and 5.36 show the absence rate and the number of absences of fifth-term Justices between 1990 and 1994, and the average absence percentage rate and number were only 3.97% and 4.6 respectively. Justice Herbert H.P. Ma had the highest absence rate in terms of both percentage and number, but he was only absent from 14 (out of 117) constitutional judicial reviews (11.97%) – so even this figure does not seem unusual.<sup>249</sup> Meanwhile Justices Liu Tieh-Cheng and Wu Geng were the only fifth-term Justices with no absence record; Justice Wu Geng was the only Justice who participated in every judicial review in the 1990s – he had the only perfect attendance record between 1990 and 1999.

In comparison with the absence rate and number of the fifth-term Justices, the absence rate percentage and number of the sixth-term Justices are more or less the same – 5.42% and 5.0 per Justice in average. Justice Lai In-Jaw had an absence rate of 18.18% (4 absences out of 22 cases) simply because he was commissioned a Justice on 1 February 1999 but was absent four times from 22 judicial reviews. Even the leading absentee,

<sup>249</sup> According to Justice Ma's interview on 19 July 2013, it is reasonable to conclude that his absences were due to his voting strategies. Justice Ma chose not to confirm this, because he said no Justice shall be a hero – every decision was made by the Justices, not by a single Justice.

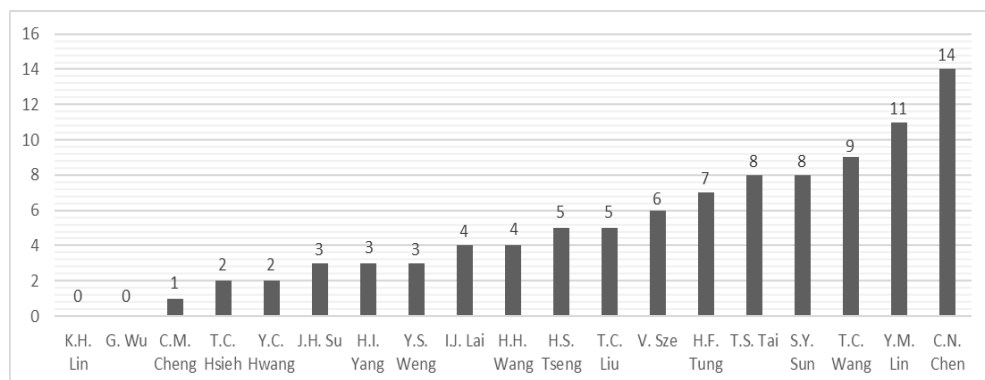
Justice Chen Chi-Nan, was only absent from 14 out of 132 judicial reviews (10.60%). Like the absence rate and number of the fifth-term Justices, these absences do not seem particularly unusual in the eyes of the author of this thesis at all. Justice Chen Chi-Nan's attendance record, for instance, showing 14 absences within a period of five years and three months (2.67 absences per year in average) seems quite reasonable when considering his physical condition – he was a lifelong sufferer from poliomyelitis.

### 5.37 Absence Rate of the Sixth-Term Justices, 1994-1999



(Source: Compiled by the author)

### 5.38 Number of Absences from Judicial Reviews (per Justices), 1994-1999



(Source: Compiled by the author)

As mentioned previously, the Justices might choose to dismiss an appeal according to Articles 4 & 9 of the Act of Constitutional Interpretation Procedure 1948/58 (Before 1 February 1993) and Articles 5 & 10 of the Act of Constitutional Interpretation Procedure 1948/93 (After 2 February 1993). Official documents show that the Justices held 240 councils to make dismissal resolutions (From *Judicial Yuan Dismissal Resolution No.893* [1990] to *Judicial Yuan Dismissal Resolution No.1132* [1999]) between 1990 and 1999. This means that on average there were 2 councils for dismissal resolutions per month in the 1990s. Each *Judicial Yuan Dismissal Resolution* contains multiple and diverse cases citing reasons for dismissal given by the Justices, despite the fact that many of the reasons given are rather ambiguous.

### 5.39 List of the Judicial Yuan Dismissal Resolutions, 1990-1999

YEAR	TERM	DISMISSAL RESOLUTIONS	BULLETINS
1990	5	Dismissal Resolution Nos.893-918	16
1991	5	Dismissal Resolution Nos.919-942	23
1992	5	Dismissal Resolution Nos.943-965	23
1993	5	Dismissal Resolution Nos.966-992	26
1994	5	Dismissal Resolution Nos.993-1012	20
	6	Dismissal Resolution Nos.1013-1015	3
1995	6	Dismissal Resolution Nos.1016-1039	21
1996	6	Dismissal Resolution Nos.1040-1061	22
1997	6	Dismissal Resolution Nos.1062-1084	21
1998	6	Dismissal Resolution Nos.1085-1109	21
1999	6	Dismissal Resolution Nos.1110-1132	23

(Source: Compiled by the author)

[R]egarding the [Justices'] Dismissal Resolutions, the Justices often 'argue ambiguously' that the appellant's 'argument is ambiguous';

however, [they] dared not disclose the instrument of appeal or the Justices in charge of [the Dismissal Resolution] for fear of public criticism.<sup>250</sup> (Chien Chien-Jung: Apple Daily 26 July 2012)

District Court Judge Chien Chien-Jung was not the only legal professional to criticise the Justices' Dismissal Resolutions. Nigel N.T. Li also stated that the Justices always avoided being politically criticised by the public via the strategic use of Dismissal Resolutions:

[D]o you know that [the Justices] dismissed a case regarding an issue of flag burning in our country, which is an offense against Article 160I of the Criminal Law? Rumour has it that the reason given by some Justices [privately] was: 'The United States Supreme Court has written down all the possible given reasons, so we could not write anything creative'. How can this be a reason for dismissal? To be honest, the entire law community knows that when confronting 'a sensitive political question wherein public opinion has [clear] preference', our Justices would either provide an 'absolute politically correct answer' in order to please the public, or dismiss [the appeal] for really obscure reasons – there would be no third possibility.<sup>251</sup> (Interview with Li on 17-JUN-2013)

The flag burning case that Li mentioned was dismissed by the *Judicial Yuan Dismissal Resolution No.1394* [2012] on 5 October 2012, and the official reason given by the Judicial Yuan was:

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<sup>250</sup> Author's Translation.

<sup>251</sup> Author's Translation.

[This Court holds that] the argument made by the appellant alleging that the disputed law was unconstitutional, is based only upon [the appellant's] personal opinion, and there is no supporting argument that points out the specific unconstitutionality of the disputed law upon which the final judgement depended. [Therefore] his appeal is found to be incompatible with Article 5I(2) of the Act of Constitutional Interpretation Procedure 1948/93 and shall be dismissed according to Section 3 of the same Article.<sup>252</sup>

Journalist Wang Chien-Chuang of the China Times Group wrote an article entitled 'The Justices Chose Indifference' after the case was dismissed, in which he said:

The Justices find themselves confronting a Hamlet's dilemma: When should they express their opinion and when should [they] choose silence? In other words, when should they interfere more and when should they interfere less?<sup>253</sup> (Wang Chien-Chuang: United Daily News 14 October 2012)

Those who are familiar with the operation of judicial review know that the reason for dismissal [given by the Justices in this case] is actually the [Judicial Yuan's] universal answer, which is applicable to all dismissals. [The Justices'] excuses 'alleged on a basis of personal opinion] and 'there is no specific argument found' are vague and general.

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<sup>252</sup> *Judicial Yuan Dismissal Resolution No.1394* [2012] (Author's Translation).

<sup>253</sup> Author's Translation.



Like the legal terminology often used by [our] judges in judgement, such as ‘it is hard to deny’ or ‘it is difficult to conclude that it is incompatible’, [these wordings are] all no more than reams of rubbish.<sup>254</sup> (ibid)

[I]t is obvious that the Justices’ Dismissal Resolution [over this case] implies additional reasons, or [they have] additional [political] misgivings.<sup>255</sup> (ibid)

Apart from the fact that the Justices’ Dismissal Resolutions are still rather ambiguous and controversial even nowadays, both the fifth-term and sixth-term Justices submitted *consilia* enthusiastically. Although there were four Justices (Justices Shih Shen-An, Lin Kuo-Hsien, Lai In-Jaw and Hsieh Tsay-Chuan) who submitted no *consilia* in the 1990s, this can still be considered normal. Justices Lai In-Jaw and Hsieh Tsay-Chuan were only commissioned on 1 February 1999 and Justice Lin Kuo-Hsien only served between 2 October 1994 and 17 March 1997. The only real exception is the fifth-term Justice Shih Shen-An, who served as a Justice for nine years from 2 October 1985 to 1 October 1994. He participated in 167 judicial reviews, from *Judicial Yuan Interpretation No.200* [1985] to *Judicial Yuan Interpretation No.366* [1994], but submitted no *consilia* during his career.

#### 5.40 Number of *Consilia* Submitted by the Fifth-Term Justices, 1990-1994

JUSTICE	1990	1991	1992	1993	1994	SUM
CHENG C.T.	3	1	3	5	4	<b>16</b>
YANG C.H.	0	5	3	3	2	<b>13</b>
LEE C.P.	4	0	2	4	2	<b>12</b>

<sup>254</sup> Author’s Translation.

<sup>255</sup> Author’s Translation.

<i>LIU T.C.</i>	2	2	1	1	3	<b>9</b>
<i>YANG Z.Z.</i>	1	2	2	3	0	<b>8</b>
<i>LEE C.S.</i>	0	2	2	2	1	<b>7</b>
<i>WU G.</i>	1	1	0	4	1	<b>7</b>
<i>CHEN R.T.</i>	1	0	3	2	1	<b>7</b>
<i>CHANG C.T.</i>	2	0	2	1	1	<b>6</b>
<i>CHANG T.S.</i>	1	0	1	2	2	<b>6</b>
<i>YANG Y.L.</i>	0	1	1	1	1	<b>4</b>
<i>H.H.P. MA</i>	0	0	1	0	2	<b>3</b>
<i>CHAI S.H.</i>	1	0	0	0	1	<b>2</b>
<i>WENG Y.S.</i>	0	0	0	1	0	<b>1</b>
<i>SHIH S.A.</i>	0	0	0	0	0	<b>0</b>

(Source: Compiled by the author)

#### **5.41 Number of *Consilia* Submitted by the Sixth-Term Justices, 1994-2000**

<b>JUSTICE</b>	<b>1994</b>	<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>SUM</b>
<i>SUN S.Y.</i>	0	6	7	6	5	2	<b>26</b>
<i>SU J.H.</i>	0	6	8	3	2	2	<b>21</b>
<i>LIN Y.M.</i>	0	8	3	3	4	0	<b>18</b>
<i>CHEN C.N.</i>	0	2	2	5	7	2	<b>18</b>
<i>LIU T.C.</i>	0	4	2	2	2	5	<b>15</b>
<i>TUNG H.F.</i>	0	1	2	1	3	2	<b>9</b>
<i>WU G.</i>	1	1	4	0	0	2	<b>8</b>
<i>V. SZE</i>	0	2	1	1	2	2	<b>8</b>
<i>TAI T.S.</i>	0	3	1	1	1	1	<b>7</b>
<i>WANG H.H.</i>	0	1	1	0	1	1	<b>4</b>
<i>WANG T.C.</i>	0	0	1	2	1	0	<b>4</b>
<i>CHENG C.M.</i>	0	1	2	0	1	-	<b>4</b>
<i>YANG H.I.</i>	0	1	0	1	0	0	<b>2</b>
<i>HWANG Y.C.</i>	-	-	-	-	-	2	<b>2</b>
<i>WENG Y.S.</i>	0	0	0	0	1	0	<b>1</b>
<i>TSENG H.S.</i>	0	1	0	0	0	0	<b>1</b>
<i>LIN K.H.</i>	0	0	0	0	-	-	<b>0</b>
<i>LAI I.J.</i>	-	-	-	-	-	0	<b>0</b>
<i>HSIEH T.C.</i>	-	-	-	-	-	0	<b>0</b>

(Source: Compiled by the author)

Tables 5.40 and 5.41 show the number of *Consilia* submitted by the fifth-term and sixth-term Justices in the 1990s. From the tables, it is not difficult to conclude that the sixth-term Justices were more willing to submit *consilia* than the fifth-term Justices. The modification of the quorum for passing a judicial review from three-fourths to two-thirds of total number of the Justices in 1993 is the main cause of the distinction. Moreover, it is also useful to know that the Justices who submitted more *consilia* were mainly specialists in civil and commercial law mainly (Justices Cheng Chien-Tsai, Yang Chien-Hua, Lee Chih-Peng, Sun Sen-Yan, Lin Young-Mou and Chen Chi-Nan), instead of constitutional and administrative law (Justices Weng Yueh-Sheng, Wu Geng and Tung Hsiang-Fei). Such a phenomenon probably implies that many of the majority opinions in the 1990s were written by Justices who specialised in constitutional and administrative law:

As to the cases [I] confronted in the Council of Justices, administrative lawsuits amounted to 70% to 80% [of the total cases appealed] and constitutional lawsuits were about 10% to 20%. Cases regarding civil or criminal issues were very few. [...] Of all the constitutional and administrative lawsuits during my 18-year justice career, especially within the sixth-term [1994-2003], I was either the Justice who wrote the majority opinion, or the one who contributed crucial ideas [to the majority opinion]. Sometimes I wrote both the majority opinion and my own opinion in a case.<sup>256</sup> (Interview with Wu on 19-OCT-2004)

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<sup>256</sup> Author's Translation.

The only exception (21 *consilia*) was Justice Su Jyun-Hsiung, who specialised in criminal law, holding a Dr.Jur. Degree from Freiburg University and who was a legal academic standing against capital punishment. Statistics tell that Justice Su Jyun-Hsiung was not someone who refrained from offering legal opinions against majority decisions. His judicial behaviour on capital punishment issues, such as *Judicial Yuan Interpretation No.476* [1999], is particularly valuable in terms of Taiwanese constitutional legal study.

## **5.7 CONCLUSION**

Statistics are commonly used by political scientists to examine hypotheses; however, this thesis does more than that. In this chapter, it has compiled large amounts of statistics pertinent to the ROC judicial power in the 1990s, telling a more persuasive story about the Judicial Yuan and the expansion of judicial power in Taiwan during the 1990s.

Firstly, this chapter provided Taiwan's media statistics between 1950 and 2005 in order to understand the development of Taiwan's media, showing that even journalists in Taiwan agree that it is very easy to access news reports and almost impossible to block information in this country. The possibility for a judge to read and accept public opinion is strong, and has been confirmed by Taiwan's leading legal journalist.

Secondly, this chapter disclosed Taiwan's elite-oriented legal education system through statistics, showing Taiwan's strong tendency towards elitism in legal education and admission to practice law. Taiwan's legal professionals are mainly social elites who are more likely to be bound by traditional Chinese values of good governance, justifying their motivation towards holding up the existing system.

Thirdly, this chapter reviewed the development of the Judicial Yuan between 1948 and 2009 in statistical terms, showing that the then Justices' common political belief in anti-communism may have been the main reason for the contraction of judicial power. Before the 1980s there is no doubt that the Justices supported the state of emergency system that strove to retake the Chinese mainland via military operations, and the statistics show that the Justices not only used judicial power in a limited way but also decided according to anti-communist policies. However, since the 1980s, the Justices began to use their power more actively because the ROC policy had shifted towards the *status quo* by that point.

Finally, this chapter has shown relevant statistics pertaining to the Judicial Yuan between the 1990 and 1999. Through these statistics, this thesis provides a vivid image of those legendary Justices who democratised and guarded the ROC – the Justices who have obtained the honourable title of guardians of the constitution.

## 6: A VICTORY FOR SINCERE DECISION-MAKING: INTERPRETATION NO.261 [1990]

### 6.1 INTRODUCTION

A court order for democratisation promulgated before political negotiation is extremely infrequent, and the democratisation of a nation processed in accordance with a court order seems even more incredible. This is why Taiwan's peaceful democratisation is globally recognised as 'Taiwan's political miracle'. However, much of the literature on Taiwan's democratisation ignores the importance of the Judicial Yuan, and few studies have evaluated the impact of *Judicial Yuan Interpretation No.261* [1990], in which the court gave direct instructions for all negotiations that took place between the political parties.

The boldness of *Judicial Yuan Interpretation No.261* [1990] seems almost unparalleled in the annals of constitutional history. The Justices showed courage in the face of political threats *en banc*, dismissing the authoritarian congress and forcing fresh and immediate elections. Moreover, the Judicial Yuan ordered the National Assembly to pass a specific constitutional amendment, thus reshaping the original Constitution that had been designed for the whole of China into a constitution that Taiwan could rely on to support democracy – precisely the sort of judicial intervention that has come to be referred to as a judicial coup d'état.

Attempts by the Control Yuan to retaliate against the Justices came to nothing: impeachment proceedings were initiated against 13 out of 15 Justices after the judgment, but not one of the impeachments was successful because public support for the Judicial

Yuan became an overwhelming force. The Justices won in every respect, as fresh elections took place on 21 December 1991 in the National Assembly and on 19 December 1992 in the Legislative Yuan. The constitutional amendment was passed on 1 May 1991<sup>257</sup> and the decision helped establish an early form of institutional alliance between the Judicial Yuan and public opinion.

When we look back on the political history of the ROC, *Judicial Yuan Interpretation No.261* [1990] can be seen as unprecedented. No judicial decision-maker had ever previously dared to challenge the government through such a radical measure, and no public opinion expected the Judicial Yuan to play such a crucial role in politics. The court order was like a surprise attack against the government, and the Judicial Yuan certainly behaved as a strong force within the move towards democratisation. It is hard to believe that the Justices who made this decision had little experience of politics beforehand, and obtained little by having made their decision. In other words, we shall bear in mind the first of four ‘but for’ causations embodied in the methodology Chapter 3.3 before reading the stories of the *Judicial Yuan Interpretation No.261* [1990] – If there was no political fragmentation through democratisation (Ginsburg, 2003: 251-252), the political space for judicial power expansion would not have opened up.

People do make decisions consciously, but it is often hard to see whether or not they visualise the actual outcome beforehand – for better or for worse. So we know the court order was given deliberately at a time when the Justices sought it political effectiveness. However, the consequences of the decision went against all expectations. There is no doubt that the Justices were attempting to achieve something despite the political

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<sup>257</sup> Constitution of R.O.C. amend. (1991).

fragmentation that was occurring as part of the process of democratisation (ibid), but they may not have realised that they were opening the gate for unexpected judicial power expansion, and were subsequently forced to behave in a different way.

This chapter maintains that *Judicial Yuan Interpretation No.261* [1990] was not merely assertive but was also a sincere decision – a bold and rare judicial intervention that fully embraced the risk of retaliation through attacks on judicial independence, the institutional integrity of the court or even the stripping of its powers of jurisdiction. As the dust settled, the constitutional crisis became a pivotal constitutional moment for Taiwan, establishing a judicialised mode of governance at the heart of Taiwan’s democratisation process. All of this was set in motion by *Judicial Yuan Interpretation No.261* [1990] – a decision immortalised in the realms of legal and political studies.

## **6.2 THE ORIGIN**

In recent years, very little attention has been given to the state body of the ROC in western studies of Taiwan, in terms of either political or constitutional-legal research. Assumptions are mostly based upon the political precondition and the acknowledged concept that Taiwan is the same entity as the ROC. However, this precondition is actually debateable.

In terms of its effective controlled territory, there is no doubt that the ROC is Taiwan, in geographical terms at least. However, in terms of national history and constitutional law, the ROC is much more than Taiwan even today. This thesis prefers to interpret the story of the origin of the *Judicial Yuan Interpretation No.261* [1990] from multiple perspectives, including the separate perspectives of the ROC and Taiwan, in order to



prevent political bias.

## **6.2.1 The Republic of China's Perspective**

The constitutional problems the ROC Government confronted in the 1950s were mainly coping with a series of constitutional crises raised because of the Republic's disastrous military frustration following the communist revolt between 1946 and 1949, as a result of which some 99.5% of the ROC's legitimate territory was *de facto* taken over by the communists, whom the global community then recognised in political and diplomatic terms as the PRC from the 1970s onwards (International Business Publications, 2012: 8). This historical event is now commonly referred to as the Chinese Civil War. At the time, however, it was seen as the communist-oriented PRC disuniting from the ROC via armed rebellion. As a consequence, the ROC's territorial decline resulted in its inability to implement the original articles of the Constitution (Hsieh, 2007: 48-63). This became a serious and complex legal and constitutional crisis that the ROC Government was forced to deal with pragmatically.

The ROC Constitution of 1947 was enacted by and for all of China, with national-level legislatures composed of representatives from each province and overseas Chinese (Lien and Chen, 2013: 50). The government considered the Constitution and its national representatives as symbolising the ROC's claim to be China's only legitimate international regime, despite the founding of the PRC (Taiwan Daily Editorial, 1987: 136-138). However, it was immediately obvious after the communist revolt that holding subsequent elections for national level legislatures in order to represent the whole of China would be politically impossible unless the PRC was successfully eliminated (Jacobs, 2006: 85; Li, 1987: 8). As a result, the government and the National Assembly

had little option but to declare a state of emergency (Wachman, 1994: 105-107) whilst mobilising the military to retake the Chinese mainland (Woo, 2011: 90-93). Meanwhile the Judicial Yuan granted the national representatives a court order,<sup>258</sup> allowing them to continue exercising legislative power until elections could be held once more (Schafferer, 2003: 31-142).

This was the political and legal response of the ROC to the communist revolt. Despite endless political debates (Taylor, 2009: 337-408), it was at least agreed that armed rebellion against government was considered unacceptable, even in modern democratic terms. As such, this thesis can find no persuasive reason in law that would have prohibited the ROC from recovering its lost territory via the suppression of a revolt, and no sensible political reason to stop the government from declaring a state of emergency (Joes, 2010: 5-67). Generally speaking, the ROC's political standpoint and the measures it took to regain its lost territory are quite understandable; the government tried by all means, with no methodological proportionality, to save the country from the communist rebels – any government would do the same, although they may devise slight variations in legalising the due process. In Taiwan's case, we can summarise the political and legal logic of the situation as follows:

1. Because of the communist revolt, a state of emergency is required; because of state of emergency, democracy is deferred.
2. Because of the communist revolt, holding elections for legislators according to the Constitution is *de facto* impossible; because of this impossibility, the

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<sup>258</sup> *Judicial Yuan Interpretation No.31* [1954].

original legislative bodies cannot be dismissed.

### **6.2.2 Taiwan's Perspective**

It is essential to recognise at this point that Taiwan was a disputed territory, much like Alsace-Lorraine in France. It was also a land of controversy. Maurits van Nassau of the Netherlands (1567-1625) was historically Taiwan's first sovereign (Cheng, 2004: 121-122) recognised under international law, and the Han-Chinese takeover of the island did not happen until 1662 (Andrade, 2011: 3-20). From 1895 Taiwan existed as a Japanese colony ceded by the Chinese Qing Empire after the First Sino-Japanese War (Roy, 2003: 32-54). However, it came under ROC control again in 1945 after the Second World War (ibid: 55-74). Although Taiwan's ethnic majority is Han-Chinese, its history sets them very much apart from the mainland Chinese.

The origin of the Taiwanese pursuit of democracy was its struggle against the Japanese colonialism<sup>259</sup> (Interview with Hsu on 10-MAY-2013) between 1921 and 1934. Their experience of Japanese colonialism fundamentally drove the Taiwanese people to pursue democracy. The ROC's declaration of emergency after the communist revolt was commonly seen as Taiwan's second colonisation (Lee, 2013: 86-90). In other words, the nationalists – at least in the eyes of the democrats – were commonly considered to be either colonisers of Taiwan (Interview with Hsu on 10-MAY-2013; Shih, 2009: 60-67), or the traitors to democracy and the country (Interview with Wu on 31-MAY-2013; Shih, 2009: 60-67). The long-term state of emergency (1948-1991) of the ROC was considered a profound betrayal of democracy.

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<sup>259</sup> See generally Petition of the Establishment of Taiwan Council, 1921-1934.

## **6.3 PUBLIC OPINION**

The evaluation of the influence of Taiwan's public opinion upon *Judicial Yuan Interpretation No.261* [1990] shall be carried out by answering the following questions:

1. Did public opinion in Taiwan support democratisation in 1990?
2. If so, did the Justices bow to this public opinion whilst making its judicial decision?

### **6.3.1 Did Taiwan's Public Opinion Support Democratisation?**

Unfortunately, no public opinion survey was undertaken in 1990 to show whether or not public opinion in Taiwan favoured democratisation. The reason for this is simple: in 1990 the ROC was still an authoritarian regime, so there was no possibility that the government would allow any such public opinion survey to be performed (Interview with Hsu on 10-MAY-2013). Even if the government were to permit a public opinion survey, its credibility under an authoritarian regime would be questionable. However, the recollections of the political leaders and constitutional law jurisprudents involved in diverse interest groups can be used to evaluate the tendencies of Taiwan's public opinion in 1990.

One of the most important political leaders as far as Taiwan's pursuit of democracy was concerned was Chairman Hsu Hsin-Liang. His opinions insinuated that it was irrational and unnecessary to have any doubts over Taiwan's desire for democracy:

The groundswell of Taiwan's public opinion was in favour of democratisation and [our people's desire of democratisation] had reached very obvious levels – even though we [the Democrats] had no public opinion survey [in support of that claim] under the state of emergency, because surveys were prohibited by the Nationalist Government. However, the Democrats, through a series of political demonstrations, such as the Chung-Li and Kaohsiung incidents, won the people's enthusiastic support. [We could see] ardent and inspired upholders of democracy everywhere, so why [would we] need a public opinion survey [to demonstrate that we were supported]? [Moreover], if [democratisation] was not highly supported by [our] society, the nationalists' compromise for peaceful democratisation would never have been materialised.<sup>260</sup> (ibid)

Lee Teng-Hui, then Chairman of the Nationalist Party and the ROC President (1988-2000), also recollected the political atmosphere in 1990:

The demonstration referred to as the 'Wild Lily Student Movement' shook both the government and society; [as a result], all kinds of appeals for [Taiwan's] democratisation became more and more radical. I made a televised speech appealing to our nationals to be calm and rational, and I reaffirmed [the government's] determination to accelerate the process of [Taiwan's] democratisation, pacifying the public opinion against the

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<sup>260</sup> Author's Translation.

Extraordinary Conference of National Assembly and responding to the radical appeal from the whole of the nation for political reform.<sup>261</sup> (Lee, 2013: 50)

Nigel N.T. Li, an essential constitutional professional who drafted the upcoming Additional Articles of the Constitution in 1991<sup>262</sup> for Taiwan's democratisation, particularly recalled the then social response to *Judicial Yuan Interpretation No.261* [1990]:

I certainly had no idea about what the motives of the Justices of the Judicial Yuan were to make such a decision as *Judicial Yuan Interpretation No.261* [1990]. However, as one of the participants of the 1990 National Affairs Conference, I can confirm to you that all the participants at the Conference at the time, when they were told about *Judicial Yuan Interpretation No.261* [1990], regardless of their political affiliations, were all surprised and excited, and appreciated what the Justices of the Judicial Yuan had done.<sup>263</sup> (Interview with Li on 17-JUN-2013)

### **6.3.2 Did Justices Read Public Opinion?**

Before answering this question, a question regarding common sense should first be considered, namely is it possible that judges were completely unaware of the tendencies

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<sup>261</sup> Author's Translation.

<sup>262</sup> Constitution of R.O.C. amend. (1991).

<sup>263</sup> Author's Translation.

of public opinion? Justice Lin Tzu-Yi is probably the jurist who provided the best answer:

It is always very difficult to [define] public opinion [precisely], or to read the tendency of public opinion [correctly]. [...] I think that within the process of judicial decision-making, a Justice should and will pay attention on public opinion, as well as other [relevant] professional comments.<sup>264</sup> (Interview with Lin on 16-MAY-2013)

One of the Justices who decided *Judicial Yuan Interpretation No.261* [1990], Justice Herbert H.P. Ma, not only seconded Justice Lin Tzu-Yi's opinion, but also affirmed his judicial decision upon this case. His recollection was:

In terms of whether the Justice of the Republic of China take public opinion seriously or not, [and] the question of whether [they] read public opinion or not, I think, speaking overall, it is nearly impossible for a jurist in the Republic of China, including Justices and judges, to completely ignore social reactions [...] <sup>265</sup> (Interview with Ma on 19-JUL-2013)

I was one of the Justices who supported the decision of the *Judicial Yuan Interpretation No.261* [1990], and I can tell you why I supported it [...] at that time the public opinion in our country was already changed, and the society could no longer accept a state of emergency, so I think the

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<sup>264</sup> Author's Translation.

<sup>265</sup> Author's Translation.

law should be modified. We the Justices had already noticed the changing political atmosphere in which [our] nationals wanted a constitutional reform, whereas our people's desire was just. Therefore, the fifth-term Justices had a common consensus that we should push the country's constitutional and political system towards this necessary reform.<sup>266</sup> (ibid)

### **6.3.3 Conclusion**

There is no doubt that the leaders of the only two political interest groups, Chairman Hsu Hsin-Liang of the democrats and President Lee Teng-Hui of the nationalists, were in the best position to evaluate Taiwan's public opinion tendencies. Their testimonies show that, even without any public opinion surveys, it was certain that Taiwan's public opinion at the times had a clear orientation towards democratisation. Being one of the drafters of the democratic constitutional amendments, Nigel N.T. Li further confirmed that the Judicial Yuan had received specific affirmative support (Hoekstra, 2003: 12-15) via the decision favouring democratisation in *Judicial Yuan Interpretation No.261* [1990]. Justice Herbert H.P. Ma's reminiscences disclose not only the common consensus of the then Justices in *Judicial Yuan Interpretation No.261* [1990], but also the Justices' collective awareness of the public's desire in this case.

## **6.4 THEORETICAL DILEMMAS OVER THE CONSTITUTION**

Western political academics often consider that Taiwan's peaceful democratisation was

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<sup>266</sup> Author's Translation.



little short of a political miracle (Fell, 2007: 16-17). However, in the eyes of constitutional legal experts and academics, this so-called ‘political miracle’ could only be achieved after clearing up a series of constitutional dilemmas. If this did not happen, the political miracle would become a revolution.

#### **6.4.1 Divided Nation’s Dilemma**

[T]he German people, in the Länder Baden [...] and Württemberg-Hohenzollern, has enacted, by virtue of its constituent power, this Basic Law of the Federal Republic of Germany to give a new order to political life for a transitional period. [...] It has also acted on behalf of those Germans to whom participation was denied.<sup>267</sup>

This is the original Preamble of the 1949 German Basic Law enacted at the time of German division (1945-1990), which includes an unusual legal term that deserves a specific mention: ‘on behalf of those Germans to whom participation was denied’.<sup>268</sup> There is no doubt that legal academics worldwide would challenge Federal Germany on the meaning of ‘on behalf of all of Germany’ (Chang, 1999: 106-109; Zimmer, 1997: 57-82) because Federal Germany only consisted of 10 of 16 German Länder plus West Berlin (Thomaneck and Niven, 2001: 8-22), so the claim of representing the whole of Germany was a controversial one which went against democratic principles. However, was there any better option for the Federal Germany on the drafting of constitutional law in 1949? The constitutional dilemma of divided nations was taking place not only in Germany, but in the ROC as well.

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<sup>267</sup> Basic Law of Germany pmbl. (1949) (Translated by German History in Documents and Images).

<sup>268</sup> Id., *see* Wiedervereinigungsverbot (Blumenwitz, 1982: 59); BVerfGE 5, 85.

The ROC had paid a massive political price, both domestically and internationally, in order to represent all of China. As mentioned previously, the government and the Judicial Yuan believed that legislators should be elected from the throughout China in order to represent the country fairly, which is why the Judicial Yuan froze subsequent elections because this of course was no longer possible:

However, our state has undergone a severe calamity, which makes the re-election of the second term of both Yuans *de facto* impossible.<sup>269</sup>

This ‘*de facto* impossibility’ approach reflected Federal Germany’s ‘on behalf of those Germans’ attitude, because both were attempting to represent the entire nation through legal means, and both were basing this upon their own political beliefs for national reunification. Moreover, both ignored the possible shift in national identity from Great-nation (N) towards Minor-nation (N1) (National Identity from N to N1; Su, 1994: 406-411). In contrast to Federal Germany, the ROC’s approach appeared potentially suicidal: it was sacrificing an entire system of democracy in the name of national reunification, which was looking increasingly impossible and thus becoming more and more unacceptable as time went by.

#### **6.4.2 From Groß-ROC towards Klein-ROC Dilemma**

As a piece of advice to Western political academics in the field of Taiwanese studies, Taiwan’s national identity is still an issue that cannot be precisely decided (Corcuff,

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<sup>269</sup> *Judicial Yuan Interpretation No.31* [1954] (Official Translation).

2013: 133-170). Most Western articles did not really see the whole picture regarding Taiwan's national identity (Brown, 2004: 1-34; Hughes, 2013: 95-128)<sup>270</sup> as far as this thesis is concerned – what constitutes Taiwanese national identity is still debatable.

This thesis has no intention of analysing Taiwan's national identity in any great depth because of this reason. However, the ROC Constitution is based upon the national identity of China as a whole (Groß-ROC), and if the implements of the Constitution are narrowed to only a Taiwanese context (Klein-ROC), the connection of the constitutional legitimacy from the identity of Great-China towards Minor-China (Groß-ROC to Klein-ROC; Constitutional Identity from N to N1) represents more than politics and would necessitate – in politico-legal terms at least – a complex surgical operation on the Constitution (Su, 1999: 296-308).

The reason for the necessity of the constitutional law shifting from the identity of Groß-ROC towards Klein-ROC was provided by Justice Su Yeong-Chin, who was one of the drafters of the upcoming Additional Articles of the Constitution 1991.<sup>271</sup> He held:

I always discuss this [concept] since in the past, there was no logical causation and no realistic necessity for a choice between reunification-independence and democracy. [...] The serious imperfections recently revealed in our state's constitutional development are not because of the uncertainty of reunification or independence, they are due to our failure

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<sup>270</sup> Some famous political leaders categorise themselves as independent promoters of Taiwanese identity, such as Shih Ming-Te Nori and Wu Jan-Fu, who hold that the ROC is their fatherland and refute any connections with the PRC (Interview with Wu on 31-MAY-2013; Shih, 2011: 1-171). Wu Jan-Fu even accepts Chinese reunification if 'the ROC remains and the PRC ceases to exist' (Interview with Wu on 31-MAY-2013). If Western academics were aware of such things, they may reconsider their conclusions on what Taiwan actually is.

<sup>271</sup> Constitution of R.O.C. amend. (1991).

to reflect the reality of national division. If our legislative body [...] is still operated under the preconditions of unification, then democracy is surely beyond its reach [...] <sup>272</sup> (Su, 1994: 406-407)

However, the constitutional shift from Groß-ROC towards Klein-ROC was not easy: there was still a paradoxical constitutional dilemma between the use of constituted power and democratic legitimacy, and this was what either the Justices or the drafters of the Additional Articles of the Constitution had to straighten out:

Even if the [first-term] National Assembly was dismissed spontaneously, the problem was still not solved. The first-term National Assembly had already lost democratic legitimacy; thus, a constitution amended by them should have no democratic legitimacy at all. So, the constitutional dilemma with no historic precedent that our country was facing was that the National Assembly were the only organ authorised by Constitution with the power of amending the Constitution, but they already lacked democratic legitimacy. However, the constitutional amendments must be amended by them in order to be procedurally constitutional, but the amendments would never be democratically legitimate as long as it was the [first-term National Assembly] that amended them. <sup>273</sup> (Interview with Li on 17-JUN-2013)

## **6.5 PREVIOUS DECISIONS OF THE JUDICIAL YUAN**

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<sup>272</sup> Author's Translation.

<sup>273</sup> Author's Translation.

There were two pertinent judicial decisions made before *Judicial Yuan Interpretation No.261* [1990] which must be reviewed in order to understand both the theoretical grounds and the political background of the Judicial Yuan within *Judicial Yuan Interpretation No.261* [1990]. These are *Judicial Yuan Interpretation No.31* [1954] and *Judicial Yuan Interpretation No.150* [1977]

### **6.5.1 Judicial Yuan Interpretation No.31 (1954)**

*Judicial Yuan Interpretation No.31* [1954] was the first decision taken in response to the constitutional crisis raised due to the dramatic loss of Mainland China. The ROC National Assembly was the beneficiary of this interpretation because it was acknowledged that it was the best constitutionally legal means of expanding legislative power. The story behind this is that the term of office of the first-term legislative bodies was coming to an end in 1951, and with the legislative bodies in their current form it would be *de facto* impossible to hold subsequent elections without retaking the Chinese mainland. The government at the time was very confident that it would be able to suppress the communist rebellion quickly, so the term of office of the first-term legislative bodies was extended annually under the President's emergency powers until 1954. By this time, however, the ROC Government had become aware of the inappropriateness of such a use of emergency power, which had not been confirmed by the Judicial Yuan (Lin, 1983: 44-55). As a result, the Executive Yuan appealed to the court and received the following ruling:

[O]ur state has been undergoing a severe calamity, which makes re-election of the second term of both Yuans *de facto* impossible. It would contradict the purpose of the Five-Yuan system as established by the

Constitution, if both the Legislative and Control Yuans ceased to exercise their respective powers. Therefore, before the second-term Members are elected, convene and are convoked in accordance with the laws, all of the first-term Members of both the Legislative and Control Yuans shall continue to exercise their respective powers.<sup>274</sup>

Obviously the court came to this decision pragmatically: compared to having no legislators representing the entire China, it would be wiser to retain the old one. The decision was made under a logical presumption that the communist revolt would be suppressed soon, a presumption that seems irrational only in hindsight. However, because of the political propaganda, this presumption was commonly held in Taiwan in the 1950s (Chen, 2005a: 221-227) and in consequence its influence over judicial decision-making was unavoidable (Lin, 1983: 44-55).

It seems reasonable to consider *Judicial Yuan Interpretation No.31* [1954] as a careless decision, because the duration of the communist revolt was never considered seriously. But the decision offered further hints at the National Assembly's desire for legislative power expansion. The National Assembly repealed their original decision over the Temporary Provisions Act 1948 through the cancellation of its annual review:

The National Assembly, in response to the realistic requirements of the restoration [of the Republic of China], with respect to the procedure regulated by the Constitution and by common agreement with no objections, promulgates that the Temporary Provisions shall be

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<sup>274</sup> *Judicial Yuan Interpretation No.31* [1954] (Official Translation).

automatically enacted before it is officially abolished.<sup>275</sup>

### **6.5.2 Judicial Yuan Interpretation No.150 [1977]**

The *Judicial Yuan Interpretation No.150* [1977] is commonly considered the sequel to the *Judicial Yuan Interpretation No.31* [1954] because it was the first case in which the Judicial Yuan restrained the National Assembly from legislative power expansion. The Justices held that:

Paragraph 6 of the Temporary Provisions Effective During the Period of National Mobilization for Suppression of the Communist Rebellion does not alter the term of elected central representatives under the Constitution [...]<sup>276</sup>

[O]nce the term of the First Legislative Yuan expired on May 7, 1951, there were no vacancies to fill. Due to national emergencies [...] members were allowed to continue to carry out their duties until the Second Legislative Yuan was elected and convened [...] only those who were already members at the time the term of the First Legislative Yuan expired could remain in office.<sup>277</sup>

Nigel N.T. Li commented on the virtue of *Judicial Yuan Interpretation No.150* [1977]. It was a case, he said, in which the Justices deliberately stopped the National Assembly from altering the term of office of the first-term legislators ‘by fact’ rather ‘by law’ – it

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<sup>275</sup> National Assembly Declaration (11 March 1954) (Author’s Translation).

<sup>276</sup> *Judicial Yuan Interpretation No.150* [1977] (Official Translation).

<sup>277</sup> *Judicial Yuan Interpretation No.150 Reasoning* [1977] (Official Translation).

was rather unfortunate ‘by fact’ that a second-term could not be elected, so the first-term legislators were needed. However, it was not legally constitutional that the legislators’ term of office was extended, even though the decision was made by the National Assembly (Interview with Li on 17-JUN-2013). Li considered that:

[T]he Judicial Yuan knew that they had no power to stop the old National Assembly from exercising legislative power indefinitely in the era [of state of emergency], but at least they could make this a *de facto* indefinite congress under constitutional control, without letting the old National Assembly arbitrarily modify and ruin [our] respected Constitution. You [surely] could accuse [our] Justices in the early period of not being brave enough to oppose [the authority] more openly, but I think that they were brave enough to protect the dignity of [our] Constitution at their age – this was probably all they could do at the time.<sup>278</sup> (ibid)

## 6.6 INSTRUMENT OF APPEAL

The instrument of appeal enshrined in *Judicial Yuan Interpretation No.261* [1990] was originally promoted and co-signed by 26 congressmen/women in the Legislative Yuan, including 19 democrats, 5 nationalists and 2 independents. Although the appeal was supported by multi-party advocates, it is normally seen as a democratic-oriented appeal, because 90.47% of all democratic congressmen/women co-signed it (19 out of 21), comprising 73.07% of all signatories. Congressmen Chu Kou-Jeng and Hong Chi-

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<sup>278</sup> Author’s Translation.



Chang were the only two democrats who did not promote the appeal.

Democratic congressman Chen Shui-Bian was undeniably the heart and soul of the appeal (Chen, 2000: 78; Interview with Li on 17-JUN-2013), and he was probably the greatest political beneficiary thereafter – Chen won the ROC presidential campaign in 2000. However, Chen was not the only politician to benefit – the future political careers of all 26 signatories are astonishing, including 2 premiers, 1 vice premier, 5 ministers and 1 vice minister, as well as 2 county mayors and 1 vice mayor.<sup>279</sup>

### **6.6.1 The Unusual Appellant**

One of the most remarkable details of *Judicial Yuan Interpretation No.261* [1990] is that it was not a case that was appealed by a number of legislators; in fact it was an unusual case in that it was appealed in the name of the Legislative Yuan as a whole, on the basis of legislative resolution:

This appeal was approved by the Resolution of the 17th Conference of the 85th Session of the Legislative Yuan.<sup>280</sup>

One obvious political question is why did the first-term legislators appeal against themselves? The genuine reason will probably remain unknown. However, Nigel N.T. Li provided a possible and persuasive explanation:

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<sup>279</sup> Premier: Chang Chun-Hsiung and Hsieh Chang-Ting; vice premier: Yeh Chu-Lan; minister: Hsieh, Shen-San, Huang Chu-Wen, Chang Po-Ya, Chen Ding-Nan and Yu Cheng-Hsien; vice minister: Tai Chen-Yao; mayor: Chiou Lien-Hui and Pang Pai-Hsien; vice mayor: Lin Cheng-Chieh.

<sup>280</sup> *Judicial Yuan Interpretation No.261 App'x* [1990] (Author's Translation).

It was very unusual in those days that the Legislative Yuan would [consent to] pass its political power to [our] judiciary for a [judicial] decision by a resolution of appeal; [I am] afraid that there may have been some political bargains made under the table. On the surface, the case was promoted by opposition democrat legislators. However, there was no constitutional appeal system for individual legislators at that time, so this appeal could not have been [successfully] made if the ruling nationalist legislators had disapproved. [...] [As far as the reason why] those old nationalist legislators approved [this appeal], despite the fact that it was probably a nationalist fixed policy, one of the highest possibilities was just like your interpretation of [the attitude of] the then legislators – they arrogantly believed that the judiciary could change nothing. I think that these old legislators really underestimated the determination of the Justices of the Judicial Yuan on protecting [our] constitutional [system].<sup>281</sup> (Interview with Li on 17-JUN-2013)

### 6.6.2 The Promoters

The original 26 promoters of the *Judicial Yuan Interpretation No.261* [1990] can be identified by their signatures, which are listed in the instrument of appeal.<sup>282</sup> The most noticeable common feature of these 26 promoters was that they could all be categorised as 1989 supplementary legislators elected in Taiwan, as opposed to the so-called ‘old legislators’ elected by and from the Chinese mainland in 1948, including 19 (out of 21) democrats, 5 nationalists and 2 independent congressmen.

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<sup>281</sup> Author’s Translation.

<sup>282</sup> *Judicial Yuan Interpretation No.261* App’x [1990].

Technically there were two kinds of first-term legislators in 1990: the ‘old legislators’ who retained their position until death or voluntarily retirement (Lee, 2009b: 283); and the ‘supplementary legislators’ who substituted the old legislators as their seats became free. This procedure had been followed since 1969, through the process of regular elections held only in the ‘Free Area of the ROC’ (mainly, but not only Taiwan) (Taiwan Daily Editorial, 1987: 136-138). Despite the fact that the government held regular elections for supplementary legislators in 1969 (7 Seats), 1972 (29 Seats), 1975 (37 Seats), 1980 (64 Seats), 1983 (65 Seats), 1986 (73 Seats) and 1989 (101 Seats) (Wang, 2005: 68); the ‘old legislators’ still constituted an absolute majority in 1990 (Lee, 2009b: 283).

Around 20 months before the appeal, in September 1988, an official symposium entitled ‘Constitution and Constitutionalism’ was published by the Legislative Yuan, including an article written by Justice Hsu Tzong-Li, who was still an academic in those days. The said article called upon the then Justice to behave more actively in order to dismiss these old legislators to pave the way for democratisation (Hsu, 1988: 8-12). Although the extent of Justice Hsu’s article’s influence upon these 26 promoters is actually unknown, this thesis argues<sup>283</sup> that Justice Hsu’s article, by providing legal means at least in theory, enlightened the 26 promoters to work towards legal action – especially considering that 10 of them were originally legal professionals (democrats: 7<sup>284</sup>; nationalists: 2<sup>285</sup>; independent: 1<sup>286</sup>) who were familiar with legal action and had

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<sup>283</sup> Because both the editor and the publisher of this symposium was the Legislative Yuan, it is reasonable to presume that Justice Hsu Tzong-Li’s article was meaningful to the then legislators.

<sup>284</sup> Congressmen Chen Shui-Bian, Hsieh Chang-Ting, Chang Chun-Hsiung, Yeh Chu-Lan, Chiou Lien-Hui, Tien Tsai-Ting and Lee Ching-Hsiung.

<sup>285</sup> Congressmen Huang Chu-Wen and Huang Chung-I.

<sup>286</sup> Congressman Chen Ding-Nan.

enough encouragement to try.

### 6.6.3 The Claim

The instrument of appeal firstly implored the Justices to fully reconsider *Judicial Yuan Interpretation No.31* [1954] according to the *clausula rebus sic stantibus* (Zimmermann, 1996: 579-582), claiming:

It has been more than 40 years since the government moved to Taiwan, [and our] politics and economy are steady [nowadays]. Moreover, [we] have become a developing country by [our] people's common efforts, and [we] all pursue the development of [our nation's] constitutional democracy. A complete re-election of the congress has become a common goal of [our] nationals, and it is the preference of public opinion. The objective [political] environment nowadays is not as it was, and [for this reason we hold that] the first-term members of both the Legislative Yuan and the Control Yuan shall cease to exercise their power.<sup>287</sup>

The use of the term *clausula rebus sic stantibus* is an attempt to persuade the court to override *Judicial Yuan Interpretation No.31* [1954], claiming that this judicial decision was only relevant under the irregular and tense political situation of the 1950s, and had no relevance in the 1990s. Moreover, the government's unlimited application of the decision of *Judicial Yuan Interpretation No.31* [1954] amounted to an unconstitutional

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<sup>287</sup> *Judicial Yuan Interpretation No.261 App'x* [1990] (Author's Translation).

denial of democracy, underlining the idea that the court should ‘reinterpret’ the *Judicial Yuan Interpretation No.31* [1954].<sup>288</sup>

Article 2 of the Constitution concludes that the sovereignty of [our Republic] shall reside in the whole body of its nationals, [whereby] the voice of the nation shall be formed from its nationals and [delivered] to the government, in order to ensure unity between the ruler and the ruled. Moreover, the specific spirit [of popular sovereignty] is to fulfil democratic politics, and this shall be materialised by [holding] regular elections for congress. [By this reason we hold] that *Judicial Yuan Interpretation No.31* [1954] [...] is incompatible with the doctrine of popular sovereignty.<sup>289</sup>

The instrument of appeal applied the litigating strategy of joinder of claims which attempted to convince the Justices via a submission of multiple arguments, an approach commonly used by lawyers in Taiwan. This submission of multiple arguments offered the Justices two options: the primary argument was the main argument of the appeal, and if it was rejected, the alternative argument would take its place immediately:

1. We claim that the decision of *Judicial Yuan Interpretation No.31* [1954] is unconstitutional because the decision is incompatible with the doctrine of popular sovereignty.

2. If our pervious claim is disproved, then we claim that the decision of

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<sup>288</sup> Id.

<sup>289</sup> Id. (Author’s Translation).

*Judicial Yuan Interpretation No.31* [1954] is still unconstitutional because it no longer reflects current circumstances, although we accept that the decision was not unconstitutional at the time it was made.

## **6.7 DECISION**

The decision on *Judicial Yuan Interpretation No.261* [1990] was promulgated on 21 June 1990, a week before the 1990 National Affairs Conference (amongst political parties) was held (28 June 1990), thereby setting up the constitutional legal grounds for democratisation for the ROC (Li, 1991: 156). It is certainly one of the most unforgettable and important judicial decisions in history – a unified judicial decision held *en banc* with no dissenting opinion in content. It aimed to strike down the authoritarian congress in favour of democratisation, and ultimately it succeeded.

### **6.7.1 A *Clausula Rebus Sic Stantibus* Decision**

The Judicial Yuan actually supported the alternative argument of the instrument of appeal, holding that *Judicial Yuan Interpretation No.31* [1954] was constitutional at the time it was made, and recalling *Judicial Yuan Interpretation No.150* [1977] on the question of the expansion of legislative terms that the Judicial Yuan had never permitted:

The Constitution provides specific terms of office for all national representatives: six years for the National Assembly Delegates, three years for the Legislators and six years for the Members of the Control Yuan, respectively. [...] After the current Constitution took effect, our nation suffered severe calamities. Upon expiration of the first term of

the Legislators and Members of the Control Yuan, it was *de facto* impossible to hold elections of the second-term representatives in accordance with the laws. [...] J.Y. Interpretation No. 31 therefore declared that “before the second-term representatives are elected and convene in accordance with the laws, all of the first-term representatives of both the Legislative and Control Yuans shall continue to exercise their respective powers.”<sup>290</sup>

After clarifying the court’s position on the issue of legislative term expansion, the Justices reaffirmed the spirit of popular sovereignty embodied in the ROC Constitution, holding that the permission of the first-term legislators to exercise legislative power as set down in *Judicial Yuan Interpretation No.31* [1954] was nothing but a *clausula rebus sic stantibus* decision; therefore, there was no reason to prevent another *clausula rebus sic stantibus* decision to be made in 1990 if necessary. In other words, the Justices did not intend to ‘override’ the *Judicial Yuan Interpretation No.31* [1954] – the decision had simply ‘expired’:

However, periodical election of representatives is an essential avenue for reflection of the will of the people and implementation of constitutional democracy. That the abovementioned national representatives were allowed to continue the exercise of their powers was necessary in order to deal with the then-existing situations and maintain the constitutional system. Since publication of the abovementioned Interpretation on January 29, 1954, the first-term

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<sup>290</sup> *Judicial Yuan Interpretation No.261 Reasoning* [1990] (Official Translation).

national representatives have been exercising their powers for more than three decades. Nevertheless, the above-mentioned Interpretation was not intended to permit the indefinite exercise of powers by the first-term Legislators and Members of the Control Yuan, or to change their respective terms. Furthermore, Article 28, Paragraph 1, of the Constitution expressly provides “The National Assembly Delegates shall be elected every six years.” Obviously, the intention of Paragraph 2 of this Article is to avoid any time gap between elections in the course of the National Assembly’s exercise of their powers. It is not intended to extend the term of office of the National Assembly Delegates indefinitely.<sup>291</sup>

### **6.7.2 An Astonishing Constitutional Court Order**

To cope with the present situation, those first-term national representatives who have not been re-elected on a periodical basis shall cease the exercise of their powers no later than December 31, 1991. Among them, those who have been *de facto* incapable of exercising or constantly failed to exercise their powers shall be immediately dismissed, after thorough investigation, from their offices. The Central Government is further mandated to hold, in due course, a nationwide second-term election of the national representatives, in accordance with the spirit of the Constitution, the essence of this Interpretation and the relevant regulations, so that the constitutional system will function properly.<sup>292</sup>

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<sup>291</sup> Id. (Official Translation).

<sup>292</sup> *Judicial Yuan Interpretation No.261* [1990] (Official Translation).



This was the court order given by the Justices in *Judicial Yuan Interpretation No.261* [1990], determining not only the legal position of the first-term legislators, but also burdening both the executive and legislature with compulsory constitutional obligations. This court order was composed of 4 decisions:

1. All the ‘old legislators’ shall be dismissed no later than 31 December 1991.
2. Of those ‘old legislators’, any who are *de facto* incompetent shall be dismissed immediately.
3. The central government is obliged to hold a national election for second-term legislators according to the Constitution.
4. If holding new election is incompatible with the Constitution, the Judicial Yuan orders the National Assembly to amend the Constitution.

The court order amending the Constitution is not easily separated from the context of the decision of *Judicial Yuan Interpretation No.261* [1990] because it is an implied legal obligation phrased in implied wordings, which is a very common judicial approach in Taiwan. As a matter of fact, there was no possibility of holding ‘a nationwide second-term election of the national representatives’<sup>293</sup> without constitutional amendment, which meant that holding an election ‘in accordance with the spirit of the Constitution, the essence of this Interpretation and the relevant regulations’<sup>294</sup> implied a court order

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<sup>293</sup> Id.

<sup>294</sup> Id.

amending the Constitution in order to make sure ‘the constitutional system will function properly’.<sup>295</sup> Nigel N.T. Li commented:

According to the reasoning of [this Interpretation], the so-called ‘nationwide second-term election of national representatives’ refers to the ‘election [...] [held only] within the Free Area [of the ROC]’ [...] and this [Judicial Yuan] Interpretation *de facto* terminates Mainland Chinese representation [...]<sup>296</sup> (Li, 1991: 158)

### **6.7.3 The Only Dissenting Opinion**

The only dissenting opinion was submitted by Justice Lee Chih-Peng, who put forward a procedural dissent that the deadline of dismissal of the first-term legislators, 31 December 1991, was improper because there was no guarantee that the second-term legislators would be able to assume power before this deadline of dismissal:

The central government, based on the Constitution, by considering the present national conditions, shall enact the Act of Election and Recall Concerning the National Representatives before Reunification as quickly as possible, without being bound by the quotas provided by Articles 26, 64 and 91 of the Constitution, and the second-term national representatives shall be elected with all deliberate haste.<sup>297</sup>

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<sup>295</sup> Id.

<sup>296</sup> Author’s Translation.

<sup>297</sup> *Judicial Yuan Interpretation No.261* [1990] (Lee Chih-Peng, dissenting) (Author’s Translation).

The [original] and supplementary first-term national representatives, including members of the National Assembly, the Legislative Yuan and the Control Yuan, shall be dismissed one day before the date that the second-term national representatives report for duty. Moreover, of those the first-term national representatives, anyone with more than 50% absence record from the conferences in a session shall be dismissed immediately.<sup>298</sup>

This was a mock-decision written by Justice Lee Chih-Peng, which formed his dissenting opinion in *Judicial Yuan Interpretation No.261* [1990]. By reading his dissenting opinion, it is not difficult to identify Justice Lee's worry – he was not sure whether the second-term legislators would be able to replace the first-term legislators in time. Whilst there was no doubt that Justice Lee supported the majority opinion, he was strongly opposed to the fixed deadline of 31 December 1991.

Chief Justice Weng Yueh-Sheng repeatedly explained why this fixed deadline must be maintained. According to Nigel N.T. Li he said:

In terms of the fact that the Judicial Yuan was ordered to dismiss the congress with a fixed deadline, Justice Weng Yueh-Sheng repeatedly explained the legal reasoning behind the Judicial Yuan's decision in his personal speeches. Justice Weng Yueh-Sheng said that the Judicial Yuan's constitutional court order for the dismissal of congress before 31 December 1991 was an 'executive method' designed to force the

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<sup>298</sup> Id. (Author's Translation).

decision of the Judicial Yuan into effect [...] <sup>299</sup> (Interview with Li on 17-JUN-2013)

Chief Justice Weng Yueh-Sheng's interpretation is certainly well-considered. It seems that the Judicial Yuan was challenging the government and congress by providing a deadline for the dissolution of congress in *Judicial Yuan Interpretation No.261* [1990]. This meant that political pressure from public opinion would be transferred towards the government and the congress, which meant that either the government or the congress would experience an even tougher political crisis if the decision was infringed, regardless of the terms of the breach.

## **6.8 RESPONSES**

The responses to *Judicial Yuan Interpretation No.261* [1990] can be evaluated by examining Taiwan's political and social responses thereafter. Political responses refer to the reactions of pertinent political interest groups in Taiwan after the decision was made, as well as social responses referring to comments on the decision and specific support given by society afterwards (Hoekstra, 2003: 12-15).

### **6.8.1 Political Responses**

Political academics worldwide appreciated the role of Taiwan's political elites in the process of democratisation (Fell, 2012: 29-42). However, many of them overestimate the importance of the 1990 National Affairs Conference to the detriment of the

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<sup>299</sup> Author's Translation.

contribution of the Judicial Yuan. For example, Joseph Wong argued:

In June 1990, he [President Lee Teng-Hui] convened the National Affairs Conference (NAC), where political elites from the ruling and opposition parties drew up a blueprint for constitutional reform. Moderate factions from both parties forged a consensus on several important reform measures, including the forced retirement of life-tenured parliamentarians [...] (Wong, 2004: 75-76)

There is no doubt that the 1990 National Affairs Conference was crucial to Taiwan's democratisation; however, the role of the Conference should be considered carefully within the chronological order of Taiwan's democratisation (Su, 1994: 4). The judicial decision for democratisation was promulgated on 21 June 1990, a week before the National Affairs Conference was held. Even though the Conference aimed at democratisation for Taiwan, it certainly did not fire the first shot, as Nigel N.T. Li recalls:

I certainly had no idea about what the motives of the Justices of the Judicial Yuan were to make such a decision as *Judicial Yuan Interpretation No.261* [1990]. However, as one of the participants of the 1990 National Affairs Conference, I can confirm to you that all the participants at the Conference at the time, when they were told about *Judicial Yuan Interpretation No.261* [1990], regardless of their political affiliations, were all surprised and excited, and appreciated what the Justices of the Judicial Yuan had done.<sup>300</sup> (Interview with Li on 17-

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<sup>300</sup> Author's Translation.

JUN-2013)

The memory of the then Justice Wu Geng is even more detailed:

During [my entire] 18-year Justice career, I was almost impeached twice [by the Control Yuan]. As well as the one I mentioned, the other impeachment was due to the decision of the ‘old’ congress via *Judicial Yuan Interpretation No.261* [1990]. However, I was not particularly afraid of being impeached at the time, [because they] attempted to impeach 13 [out of 15] Justices [who supported the congress dismissal positively] [...] <sup>301</sup> (Interview with Wu on 19-OCT-2004)

In fact, the political responses to the *Judicial Yuan Interpretation No.261* [1990] were polarised. The politicians who sought democratisation for Taiwan were ‘all surprised and excited, and appreciated what the Justices of the Judicial Yuan had done’ (Interview with Li on 17-JUN-2013). However, the politicians who held a more conservative opinion sought political retaliation against the Justices (Interview with Wu on 19-OCT-2004). The polarised political responses demonstrated the importance of this interpretation.

### **6.8.2 Social Responses**

It was fairly obvious that Taiwan’s public opinion would appreciate the decision of *Judicial Yuan Interpretation No.261* [1990], considering the previous demonstration of

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<sup>301</sup> Author’s Translation.

public support for democratisation. However, after 25 years on from 1990, this thesis intends to re-examine how this case has been recorded in order to evaluate the weight of this specific case by examining the social responses.

An undergraduate textbook entitled 'History of Taiwan' written by Taiwan's own historians commented:

After the Supplementary Election of the Legislative Yuan in 1989, the senior congressmen [old legislators] still held more than half the seats, and the situation in the National Assembly was even worse. The situation triggered an intense discontent across the entire nation. [...] Finally, via the decision of the Justices of the Judicial Yuan, the deadline of dismissal, 31 December 1991, was given to the first-term national representatives, and so the reform of the national-level legislators was ultimately accomplished.<sup>302</sup> (Lee, 2009b: 283)

Congressman Chen Shui-Bian, the most important promoter of *Judicial Yuan Interpretation No.261* [1990], as well as the first democratic President of the ROC (2000-2008), evaluated the political weight of this case in his autobiography as a participant, and he concluded:

In order to terminate the political actuality of an indefinite congress, [we] must think outside the box and map out [our] strategy at a constitutional litigation level. [...] On 21 June 1990, when I heard that the case had

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<sup>302</sup> Author's Translation.

been approved, I was pleasantly surprised. If there had been no *Judicial Yuan Interpretation No.261* [1990], there would be no complete re-election of the congress, and there would be no democratic innovation or advancement even now.<sup>303</sup> (Chen, 2000: 78)

Justice Tung Hsiang-Fei was a national representative of the National Assembly who participated in the enactment of the upcoming constitutional amendments.<sup>304</sup> He also wrote his own account of social responses to *Judicial Yuan Interpretation No.261* [1990]:

The 1990s was [not only] an epoch of challenges but also the most convulsive era in the history of our nation's constitutionalism. [...] The guardians of the constitution, namely the Justices, promulgated *Judicial Yuan Interpretation No.261* [1990] on 21 June 1990, the eve of the convocation of the National Affairs Conference, in response to the announced issue of the termination of office of national representatives on time [...] the Justices' historical declaration freed up the convoluted circumstances relating to the issue of the term of office of the old national representatives for decades, and terminated a series of misconstructions over the issues of the indefinite congress and legislative legitimacy. [Moreover, the Justices] completely reconstructed the genuine constitutionalism of [this] nation.<sup>305</sup> (Tung, 2005: 24)

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<sup>303</sup> Author's Translation.

<sup>304</sup> Constitution of R.O.C. amend. (1991).

<sup>305</sup> Author's Translation.



## 6.9 JUDICIAL SELF-INTEREST

The most common pattern of judicial power expansion in the West occurs when Justices decide strategically, considering their own judicial self-interest (Smith, 1995: 1-13) in order to secure or expand their influence over the political system. Such a pattern, however, would likely be incompatible within *Judicial Yuan Interpretation No.261* [1990] because the court's political influence was suddenly and dramatically amplified, although they made no strategic decision at all.

### 6.9.1 Did Justices Decide Strategically?

The answer to whether the *Judicial Yuan Interpretation No.261* [1990] was decided strategically or not is surprising – all the related evidence leads to a negative conclusion:

[T]he issue of indefinite congress must be solved at some time or other, so the Judicial Yuan was not able to sit idly by indefinitely. [I think that people from] your generation should have heard exactly what happened [in those days]: it was questionable whether those old national representatives represented the public opinion of the time, despite the fact that they were still [physically] capable of exercising power? They were all elected from the Chinese mainland. Besides, how could a representative elected 40 years ago reflect public opinion now? For this reason, we – the majority of the fifth-term Justices – held that [our] nation must have [constitutional and political] innovation.<sup>306</sup> (Interview

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<sup>306</sup> Author's Translation.

with Ma on 19-JUL-2013)

Justice Herbert H.P. Ma was not the only Justice to mention the common consensus amongst the Justices, proving that the decision of the *Judicial Yuan Interpretation No.261* [1990] was mostly a sincere decision. Justice Yang Yu-Ling recalled an unsuccessful ‘political intervention’ during the decision-making process, explaining the difference between political belief (sincere decision) and political intervention (strategic decision):

The Constitution, after all, is a creation of politics, so it would be wrong to conclude that the Justices were not political. However, [a Justice] being political does not mean politics will interfere with his duties – as far as I know, [I experienced] no political interference [in general]. If there was any political interference [during my career], it would have been *Judicial Yuan Interpretation No.261* [1990], [namely] the case of the dismissal of the indefinite congress for complete re-election. Despite that, I think the political interference did not come from the government. Frankly speaking, the deadline for the dismissal of congress for re-election was originally planned to be 24 months. However, the then democratic congressmen interfered in [the decision] because they wished to expel these ‘old thieves’ immediately, [or at least] within 12 months. Finally, an 18 months deadline was placed by the Judicial Yuan’s Interpretation because [all] the relevant laws must be amended before the deadline, and re-elections needed to be held too.<sup>307</sup>

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<sup>307</sup> Author’s Translation.

(Interview with Yang on 26-NOV-2002)

According to Justice Yang Yu-Ling, the only strategic decision<sup>308</sup> in *Judicial Yuan Interpretation No.261* [1990] was the shortening of the deadline of the indefinite congress dismissal from 24 to 18 months, whereas the main decision was sustained:

It was a common consensus that the ‘old legislators’ should be dismissed at the time; however, the ‘old legislators’ misjudged and held that the Justices would not dare to make a detrimental decision against them. The outcome [for sure] ‘pissed the old legislators off’, and they attempted to reverse the situation by impeaching the Justices through the Control Yuan.<sup>309</sup> (ibid)

### **6.9.2 Did Judicial Power Expand Thereafter?**

In 1998 Chief Justice Weng Yueh-Sheng published an article to mark the 50-year anniversary of the establishment of the Justices, retracing the political roles of the Justices through specific cases in every decade, and his comment on *Judicial Yuan Interpretation No.261* [1990] was:

In 1990 the Justices promulgated *Judicial Yuan Interpretation No.261* [1990] [...] which constructed the constitutional legal grounds for the upcoming re-

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<sup>308</sup> This thesis argues that the political intervention from the democrats was only a message (or pressure) to remind the Justices about public opinion under the democrats’ view. The Justices did not surrender to the democratic idea of political intervention (deadline: immediately or no more than 12 months). However, they revised their original deadline because of political intervention. Therefore, it is hard to define whether or not this was a genuine strategic decision.

<sup>309</sup> Author’s Translation.

elections of the national representatives, [thus] opening the door for Taiwan's [political] innovations in democratic constitutionalism.

The number of highly politicised cases did not reduce because of democratisation due to the termination of the authoritarian rule. In fact, due to the Justices' contribution to Taiwan's democratisation via *Judicial Yuan Interpretation No.261* [1990], there were more and more highly political cases [claiming to be] constitutional controversies appealing to [the Judicial Yuan].<sup>310</sup> (Weng, 1998: 310-311)

Nigel N.T. Li can be considered Taiwan's most successful barrister in the field of constitutional litigation. He is undoubtedly one of the leading legal professionals, and is well experienced in monitoring Taiwan's constitutional judicial behaviour. His opinion as to whether the Justices captured more political power via the decision of the *Judicial Yuan Interpretation No.261* [1990] was:

I agree that you think the Justices of the Judicial Yuan are [also] a [political] beneficiary of *Judicial Yuan Interpretation No.261* [1990]. However, that is because the Judicial Yuan allowed the entire country to believe that constitutional litigation is the best option for resolving political controversies. Moreover, the reason why the Judicial Yuan is capable of playing such a role is because its constitutional legal decisions are usually theoretical brilliant level, as well as compatible with the spirit of the Constitution. So the Judicial Yuan's political

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<sup>310</sup> Author's Translation.

credibility is created and reinforced because the entire nation is satisfied [with their decisions].<sup>311</sup> (Interview with Li on 17-JUN-2013)

The story of the *Judicial Yuan Interpretation No.261* [1990] exactly demonstrates that Western thoughts, on a theoretical basis of power and interest, may not be an appropriate way of explaining our nation's [judicial behaviour]. Deciding the *Judicial Yuan Interpretation No.261* [1990] would have been the worst strategy of the fifth-term Justices, if they had been attempting to reinforce their own political interests. Their best approach was to do nothing but to wait until the final political resolution was made as a reflection of political reality. The then Nationalist Party controlled the Republic of China for more than 60 years, and their power within the government was deep-rooted, so how dare these 15 Justices challenge the Nationalist Party [if they thought about political interests]? According to Western power theories, who would agree that a judiciary's brave challenge against a 60-year-authoritarian rule was a very wise political decision?<sup>312</sup> (ibid)

## 6.10 CONCLUSION

[T]his [old lady's behaviour] reveals that the job a Justice [or judge] is doing, from the perspective of [our] citizens, is authorised by and on behalf of God, so [she] begs for a just judicial decision. As long as [you are] a judge, [you are] obliged to contribute [your knowledge] sincerely.

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<sup>311</sup> Author's Translation.

<sup>312</sup> Author's Translation.

[...] Being a judge, [you] must dedicate [your life to society] [...] <sup>313</sup>

(Interview with Sun on 28-NOV-2004)

Justice Sun Sen-Yan encouraged the next generation of Justices and judges by sharing his opinion of the moral tradition of the ROC judiciary, showing how and why an ‘unbelievably’ sincere decision was made by the Justices in *Judicial Yuan Interpretation No.261* [1990]. The fifth-term Justices in 1990 did what they thought to be just without any extra considerations. This meant that they did not realise their just decision in *Judicial Yuan Interpretation No.261* [1990] could play to their own judicial self-interest, as Nigel N.T. Li’s commented:

The Justices of the Judicial Yuan later found themselves becoming the arbitrators of political controversies in the Republic of China, which was probably an outcome beyond their expectations or their original intentions when they decided *Judicial Yuan Interpretation No.261* [1990]. [However], I believe that every jurist in our country would have attempted to find a path towards [our] nation’s constitutionalism at that moment; [thus], whoever was the fifth-term Justice, the decision of the *Judicial Yuan Interpretation No.261* [1990] would be the same. <sup>314</sup>

(Interview with Li on 17-JUN-2013)

*Judicial Yuan Interpretation No.261* [1990] was a victory for sincere decision-making, manifesting not only the moral belief that justice shall triumph over evil, but also affirming Taiwanese aphorism that ‘God blesses [only] the honest and straightforward

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<sup>313</sup> Author’s Translation.

<sup>314</sup> Author’s Translation.

people'. However, this thesis does not hold *Judicial Yuan Interpretation No.261* [1990] to be an example that contradicts judicial power expansion theories in the West; indeed, it is an extraordinary example that can only improve Western theories – Judges may decide strategically; however, making a sincere decision, in some circumstances, is actually the best judicial strategy, even though judges may not be aware of that.

## 7: JUDICIAL POWER EXPANSION THROUGH ADVISORY OPINIONS AND STATE ORGAN CASES

### 7.1 INTRODUCTION

Chapter 7 illustrates the new role of the Judicial Yuan that opened up after the promulgation of *Judicial Yuan Interpretation No.261* [1990], transforming it from ‘a constitutional court that served an authoritarian regime’ (Ginsburg, 2003: 106) into an assertive political actor in favour of democratisation during the Nationalist Government’s political crisis. Throughout this period, the fifteen Justices not only demonstrated their assertiveness but also showed their skill and capacity for playing a crucial role in the realm of mega-politics (Hirschl, 2004: 71-108). *Judicial Yuan Interpretation No.261* [1990] signalled to all other actors in Taiwan – interest groups, opposition politicians and citizens – that constitutional litigation was now a new mechanism for political action. The data-sets compiled for this chapter illustrate the dramatic rise in constitutional litigation in relation to political controversies. Meanwhile, the increasing number of state organ disputes that needed to be resolved through judicial intervention pushed the Judicial Yuan towards the centre of Taiwanese politics and fed directly into the process of judicial power expansion (judicialisation of politics).

According to Article 173 of the Constitution, the authority of the Judicial Yuan in constitutional matters is absolute, and all of the court’s decisions enjoy binding force with immediate legal effect. In other words, whether state organs’ litigations or governmental requests for advisory opinions come before the court, the Justices’ orders must be unconditionally complied with. Given this institutional design, any state organ that approaches the Judicial Yuan admits deference in general and encourages the



Justices to exercise the power of the last word in particular cases. The increasing frequency of state organ cases provides the quantitative basis for Chapter 7, whilst the increasing importance and politicisation of the matters brought before the court is explored from a qualitative angle.

There is no denying that the Judicial Yuan carried more and more weight in politics, whilst state organs' litigations and governmental requests for advisory opinions became logical options for solving political controversies in the 1990s. Since the promulgation of *Judicial Yuan Interpretation No.261* [1990] the Judicial Yuan was seen by the public as a populist institution that would protect democracy from autocracy, and the Justices enjoyed the constitutional power of the last word without intervention accordingly. In contrast to the Judicial Yuan pre-1990, the Justices projected a confident image of being capable of judging political controversies because they were capable of 'making present again' (Pitkin, 1967: 209) through judicial decision-making. Hence, the second of the four 'but for' causations embodied in the methodology chapter (Chapter 3.3) reminds us of the power of judicial assertiveness in Taiwan – If there was no strong public support for the Judicial Yuan (Hoekstra, 2003: 12-15), the Justices would have used the opportunity for judicial power expansion in a different way.

American scholars such as Segal and Spaeth have no doubt that *elected* judges will be influenced by public opinion, but whether public opinion influences *appointed* judges or not remains to be seen (Segal and Spaeth, 2002: 427). However, the Justices of the Judicial Yuan in the 1990s – along with public opinion – broke through the barrier of appointed judges by challenging them and even successfully dissolving their appointments in *Judicial Yuan Interpretation No.261* [1990]. This crucial historical event thus changed the political character of the Justices. They were no longer

appointed judges; instead they became elected judges, and their judicial power expansion was based upon public support. In reality, this meant that democracy could not be consolidated simply by the fall of the authoritarian regime, and freedom can only be safeguarded until genuine rule of law is restored. None of these can be done immediately, and people expected the Justices to be the guardians of the constitution at all times (Sze and Tsai, 2007: 699-700).

Throughout the 1990s, the Judicial Yuan decided a total of 58 state organ cases. Out of these, 19 were coded as advisory opinions and 39 were constitutional litigation cases with a state organ as both appellant and respondent. Due to the involvement of apex political institutions, all these cases play a special role in this thesis. They form a group, complementing each other in terms of appellant type, namely litigation between branches of government. Together, these 58 cases provide strong quantitative and qualitative evidence of Taiwan's judicial power expansion, and open a window into the Judicial Yuan's decision-making process.

Chapter 7 begins by categorising the 58 cases under three headings:<sup>315</sup> Firstly, separation of powers games, or inter-branch governmental conflicts, for example when the legislature litigates to force a minister to reveal the contents of a report; secondly intra-branch conflicts, for example, members of a legislature litigate in relation to a legislative procedure, and thirdly non-partisan cases which are mostly (although not limited to) technical or procedural legal details that are completely unrelated to the political agenda.

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<sup>315</sup> In Taiwan, both constitutional litigation and requisition for advisory opinion are counted as judicial reviews and are reported in the same series of Judicial Yuan case law reports, as Judicial Yuan Interpretation plus a numeric identifier.

As far as separation of powers games are concerned, the Judicial Yuan acts as the most important political mediator. The quantitative and qualitative approaches of this chapter illustrate how complex political conflicts between different state organs were resolved through constitutional litigation. Moreover, the Judicial Yuan played a crucial role in the resolution of intra-branch conflicts, in which competing factions within the legislative body had been unable to resolve between themselves. The Judicial Yuan was even approached for the resolution of non-partisan cases, such as a state organ's requisition for advisory opinion simply because the appellate organ did not know what to do next. collectively, these cases not only reveal the expansion of judicial power after *Judicial Yuan Interpretation No.261* [1990], but also display the Justices' capacity for strategic decision-making in the context of separated powers.

## **7.2 THE ROLE OF THE JUDICIAL YUAN IN STATE ORGAN LITIGATION**

Whilst more litigants brought more and more cases to the Judicial Yuan after 1990<sup>316</sup> (Weng, 1998: 310-311), the number of judicial reviews requested by state organs also increased, providing the first quantitative evidence. In addition, the nature of the issues that the Judicial Yuan was meant to address through the judicial review mechanism also changed, pushing the court into the realm of mega-politics (Hirschl, 2004: 71-108). State organs and individuals were coming to rely on the Judicial Yuan's judicial review for settling contentious political controversies.<sup>317</sup>

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<sup>316</sup> See Tables 5.9 and 5.10 on pages 180 and 181.

<sup>317</sup> Basic game theory (McCarty and Meirowitz, 2007: 1-26) explains how power is balanced and imbalanced between separated branches. When different government organs or legislators fight a case in the Judicial Yuan, they all have a preferred outcome. As the Justices usually have the final word in state organ litigation – it is practically almost impossible to override via constitutional amendment – judicial review in such cases is, by nature, an exercise of power (Hargreaves-Heap and Varoufakis, 2004: 45).

As in other countries, various types of constitutional litigation can be distinguished, even if at first sight the abstract and general nature of the ROC Constitution leaves questions of process and *locus standi* entirely open:

The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders.<sup>318</sup>

Laws that are in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a law is in conflict with the Constitution, interpretation thereon shall be made by the Judicial Yuan.<sup>319</sup>

Due to the abstract nature of the Chinese language, particularly in its official and form, Articles 78 and 171 may seem to be mere principles, but in combination with the Constitutional Interpretation Procedure Act, 1948/1993<sup>320</sup> they actually form the concrete legal basis for constitutional litigation practice:

1. Article 171 stipulates that the Constitution is supreme and anyone who doubts its constitutionality shall request an interpretation which can only be made by the Judicial Yuan.

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<sup>318</sup> Constitution of R.O.C. § 78 (1947) (Official Translation).

<sup>319</sup> Constitution of R.O.C. § 171 (1947) (Official Translation).

<sup>320</sup> The amendment of the Constitutional Interpretation Procedure Act in 1993 reveals the expansion of judicial power. After the Constitution was amended in accordance with the Judicial Yuan's order, the aforementioned Act was also amended, by which the Judicial Yuan's review power was largely expanded, along with a lower quorum level – from three-fourths to make up a majority to two-thirds votes (ROC Judicial Yuan, 1998: 36-42). *See also* Act of Constitutional Interpretation Procedure § 14 (1948/93).

2. Article 78 stipulates that the Judicial Yuan is the only state organ that has the ultimate power to interpret laws and orders.
3. Linguistically,<sup>321</sup> both Articles stipulate that the Constitution, the acts of the Legislative Yuan (laws) and the executive actions (orders) are all what the Judicial Yuan say they are. Hence the compulsory nature of Judicial Yuan's advisory opinions is not even up for debate. The moment a request for judicial interpretation is made, the Justices' orders are 'binding upon every institution and person in the country, and each institution shall abide by the meaning of these interpretations in handling relevant matters'<sup>322, 323</sup>.

In Taiwan, an advisory opinion requested by a state organ can be *ex ante* or *ex post*. For example, the Justices were asked for guidance *ex ante* in relation to the amendment of Civil Code in *Judicial Yuan Interpretation No.365* [1994] and the proper procedures for enactment of the laws *ex post* in *Judicial Yuan Interpretation No.342* [1994]. The distinction of advisory opinions in Taiwan between *ex ante* and *ex post* is therefore irrelevant, but the distinction between an event which cannot be agreed upon within a state organ (intra-branch conflict) and a requisition based on an agreement of a state organ (non-partisan case) is crucial, because the former is appealed in accordance with

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<sup>321</sup> Almost paraphrasing Justice Hughes' comment that 'the constitution is what the judges say it is'.

<sup>322</sup> *Judicial Yuan Interpretation No.185* [1984] (Official Translation).

<sup>323</sup> Chien-Liang Lee further sub-categorises Taiwan's state organ litigation into authority disputes (Lee, 2010: 86, 97-100) and 'doubt interpretation' (ibid: 87-89, 100-103); at the same time Lee merges the 'litigation between government organs' (ibid: 86) and the 'interpretation initiated by one-third of the Legislators or more' (ibid: 99) into the same category. As far as this thesis is concerned, what matters first and foremost is not the subject of litigation but the identity of appellant and respondent to identify all 'separation of powers games' that lead to judicial interventions, no matter if the latter 'advisory opinions' or 'intra-branch conflicts'.

Article 5I(3) of the Constitutional Interpretation Procedure Act 1948/93, and the latter is requested on the basis of Article 5I(1)<sup>324</sup>:

The grounds on which the petitions for interpretation of the Constitution may be made are as follows:

1. When a government agency, in carrying out its function and duty, has doubt about the meanings of a constitutional provision; or, when a government agency disputes with other agencies in the application of a constitutional provision; or, when a government agency has questions on the constitutionality of a statute or regulation at issue;

3. When one-third of the Legislators or more have doubt about the meanings of a constitutional provision governing their functions and duties, or question on the constitutionality of a statute at issue, and have therefor initiated a petition.<sup>325</sup>

## **7.3 STATISTICAL INSIGHTS**

During the time period 1990-1999, 58 out of a total of 249 cases (23.29%) were constitutional judicial review cases in which both appellant and respondent (if applicable, some cases had no respondents) were state organs, and these 58 cases could be categorised into three classifications: (1) Separation of powers games, (2) Intra-

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<sup>324</sup> This thesis does not apply Lee's categorisation for a variety of reasons. It is illogical to categorise separation of powers games and intra-branch conflicts as authority disputes because the grounds of requisition for judicial review are categorised differently by the Constitutional Interpretation Procedure Act 1948/1993.

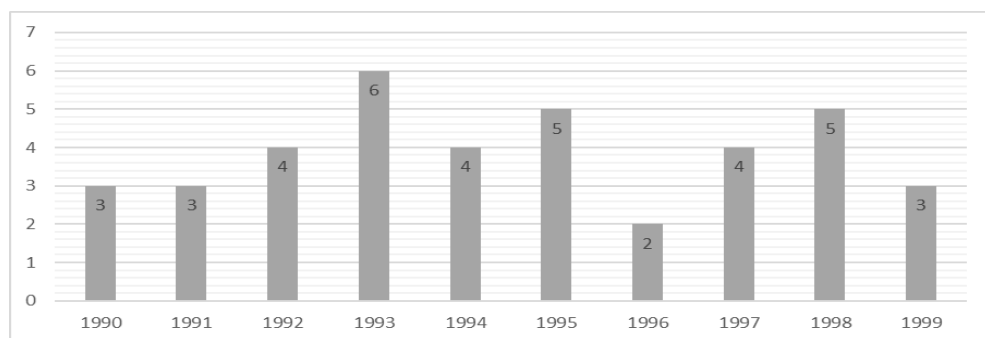
<sup>325</sup> Act of Constitutional Interpretation Procedure § 5 (1948/93) (Official Translation).

branch conflicts, and (3) Non-partisan cases.

### 7.3.1 Separation of Powers Games

This chapter sees separation of powers games as constitutional litigation cases being appealed to the Judicial Yuan which involve political controversies (Mason and Stephenson, 2009: 49-50). These cases occurred between state organs in terms of allegations of unconstitutionality by the appellant organ, seeking a judicial decision that could constitutionally force the respondent organ to back down from its original position. The virtue of studying the separation of powers games in the realm of constitutional politics is therefore to observe the genuine interactions between state powers via statistics (case-coding), evaluating a state organ's political influence as it waxes and wanes (Clark, 2011: 159-206). In this way, a nation's true separation of powers structure can be found. This means that knowing the appellant organ in a specific case represents a way of identifying the weaker power, and by knowing the respondent organ, the identity of the stronger power is uncovered. So by calculating the numbers of appellants and respondents via case-coding, the real political balance of powers will be disclosed by studying the statistics.

**7.1 Number of Separation of Powers Games, 1990-1999**



(Source: Compiled by the author)

From 1990 to 1999, 39 of a total of 249 constitutional judicial reviews fell within the ambit of separation of powers games, and surprisingly the legislatures in Taiwan acted as the appellants within 32 (82.05%) of these cases, including the Legislative Yuan (25 cases), the City Councils of Taipei (5 cases) and Kaohsiung (1 case), as well as the Taiwan Provincial Assembly (1 case). The Legislative Yuan was not only the champion of all the appellants (64.10%); in contrast to the Executive Yuan's figure (4 cases, 10.26%). It appears that the Legislative Yuan was always the underdog in the separation of powers games, bringing 16 cases to the Judicial Yuan against the Executive Yuan, as well as 2 cases against the President.

Statistics covering the respondents also confirm the political situation of the Legislative Yuan. The administrations in Taiwan played respondent roles in 24 (61.54%) cases, including the Executive Yuan (18 cases), the City Government of Taipei (4 cases) and the President (2 cases). In contrast to the figures on the appellants, the Executive Yuan was filed 16 out of 18 (88.89%) lawsuits by the Legislative Yuan, along with the President who was sued twice, both times by the Legislative Yuan. A glance at the separation of powers games in Taiwan between 1990 and 1999 easily reveals that the Legislative Yuan was the main political underdog, fighting the Executive Yuan (16 out of 25 cases: 64.00%) and the President (2 out of 25 cases: 8.00%) through constitutional litigation.

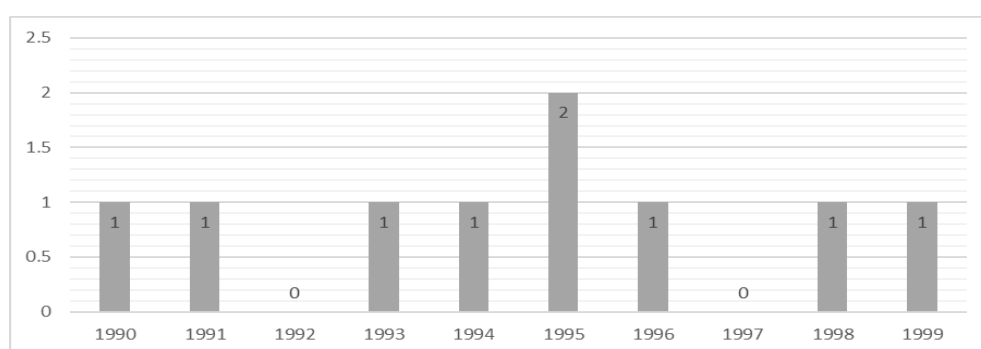
### **7.3.2 Advisory Opinions: Intra-branch Conflicts**

This thesis considers constitutional litigation in relation to the legislature's internal conflicts to resolve stalemate between political parties as intra-branch conflicts. The



legislature appeals to the Judicial Yuan for an advisory opinion in order to subdue contention through judicial means, seeking advice. However, this is more about political strategies – when a legislature appeals to the Judicial Yuan for constitutionality, they blame their colleagues from the opposite parties for acting unconstitutionally, thereby requesting an injunction that will force the opposition to surrender.

## 7.2 Number of Intra-branch Conflicts, 1990-1999



(Source: Compiled by the author)

## 7.3 List of Intra-branch Conflicts Cases, 1990-1999

<i>Year</i>	<i>Case Number</i>	<i>Appellant</i>
1990	No.254	National Assembly
1991	No.283	Legislative Yuan
1993	No.314	National Assembly
1994	No.342	Legislative Yuan
1995	No.381	National Assembly
	No.391	Legislative Yuan
1996	No.401	Legislative Yuan
1998	No.467	Legislative Yuan
1999	No.485	Legislative Yuan

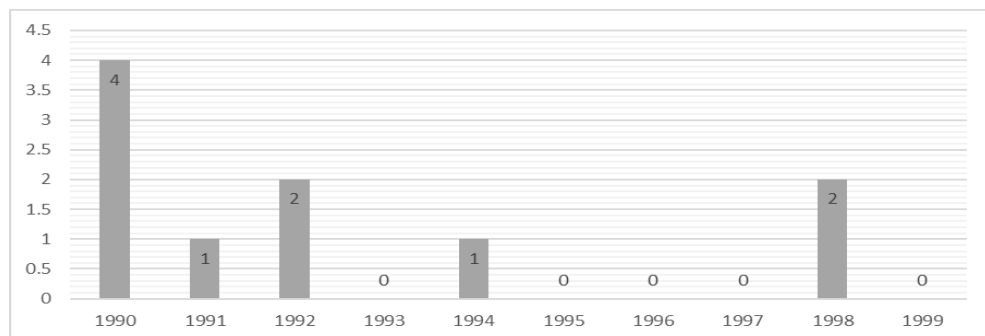
(Source: Compiled by the author)

From 1990 to 1999, 9 out of a total of 249 cases could be categorised as intra-branch conflicts, including 6 cases appealed by the Legislative Yuan and 3 cases appealed by the National Assembly. Even though 9 cases are a fairly small number, the total is still important because it means that the Judicial Yuan was involved in the legislative intra-branch conflicts almost once per year, replacing the original resolutions with advisory opinions, thus becoming the genuine decision maker through judicial means, and defying legislative autonomy in the process.

### 7.3.3 Advisory Opinions: Non-partisan Cases

There were 10 advisory opinions requested beyond the realm of political controversies in the 1990s – 1 case per year on average. This thesis defines these cases as non-partisan cases. However, it is important to study these non-partisan cases because they are still political. If a state organ appeals to the Judicial Yuan for any of its legal and constitutional functions, asking the Justices whether its use of power is constitutional or not, this implies that the appellant state organ considers the Judicial Yuan as the ultimate constitutional authority within Taiwan's political system.

**7.4 Number of Non-partisan Cases, 1990-1999**



(Source: Compiled by the author)

### 7.5 List of Non-partisan Cases, 1990-1999

<i>Year</i>	<i>Case Number</i>	<i>Appellant</i>
1990	No.258	Kaohsiung City Council
	No.259	Taipei City Council
	No.260	Taiwan Provincial Assembly
	No.262	Control Yuan
1991	No.278	Examination Yuan
1992	No.298	Judicial Yuan
	No.308	Executive Yuan
1994	No.365	Legislative Yuan
1998	No.466	Examination Yuan
	No.470	President

(Source: Compiled by the author)

The list of the appellant state organs illustrates the Judicial Yuan's political importance particularly well – all of Taiwan's Pentapartite powers requested at least one non-partisan advisory opinion in the 1990s, including the President (1 case), the Executive Yuan (1 case), the Legislative Yuan (1 case), the Judicial Yuan (1 case), the Examination Yuan (2 cases) and the Control Yuan (1 case).

## 7.4 SEPARATION OF POWERS GAMES

Between 1990 and 1999 the separation of powers games in Taiwan was composed of multiple political players from across the nation, including the President, the National Assembly and all the Pentapartite powers, as well as the local governments and

legislatures. The results of the separation of powers games can be analysed through case-coding. From this we can see that the Legislative and Executive Yuans played the most important roles in these games, not only because of the total of lawsuits from the two Yuan(s) combined represented the largest proportion of cases, but also because the strategic decisions made by Judicial Yuan sought to ‘mould’ the two powers silently.

#### 7.4.1 The Legislative Yuan

Between 1990 and 1999, the Legislative Yuan being as the appellant state organ in Taiwan’s separation of powers games, set a record of 12 approvals, 9 dismissals, 3 partial approvals and 1 political-question dismissal, as well as 2 wins and 9 losses whilst being the respondent. The Legislative Yuan, in sum, was involved in 30 out of 39 separation of powers games (25 appellants and 5 respondents, 76.92%), and set a record of 14 wins (46.67%), 12 losses (40.00%) and 3 draws (10%).

#### 7.6 The Legislative Yuan's Records over the Separation of Powers Games, 1990-1999

<b>TOTAL</b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b><i>Appellant</i></b>	12	9	3	1
<b><i>Respondent</i></b>	2	3	0	0
<b><i>against THE PRESIDENT</i></b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b><i>Appellant</i></b>	1	1	0	0
<b><i>against THE EXECUTIVE YUAN</i></b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b><i>Appellant</i></b>	9	6	0	1
<b><i>Respondent</i></b>	0	1	0	0
<b><i>against THE JUDICIAL YUAN</i></b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b><i>Appellant</i></b>	1	0	1	0

<b>against THE EXAMINATION YUAN</b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b>Respondent</b>	0	1	0	0
<b>against THE CONTROL YUAN</b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b>Appellant</b>	0	0	1	0
<b>Respondent</b>	1	0	0	0
<b>against TAIWAN PROVINCIAL ASSEMBLY</b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b>Respondent</b>	0	1	0	0
<b>against KAOHSIUNG CITY COUNCIL</b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b>Respondent</b>	1	0	0	0

(Source: Compiled by the author)

It is obvious that the Executive Yuan was the Legislative Yuan's most important political competitor. The Legislative Yuan appealed against the Executive Yuan on 16 different occasions, with a record of 9 approvals, 6 dismissals and 1 political-question dismissal. Conversely, the Executive Yuan appealed against the Legislative Yuan only once, winning the case. The second most important political competitor to the Legislative Yuan was the National Assembly. The Legislative Yuan appealed against the National Assembly for 4 times, with a record of 2 approvals, 1 dismissal and 1 partial approval. From 1990 to 1999, the Legislative Yuan actually filed separation of powers games against all the other 4 Pentapartite powers in Taiwan, as well as the President and the National Assembly; however, no one played as important a role as the Executive Yuan.

*Judicial Yuan Interpretation No.461* [1998]

*Judicial Yuan Interpretation No.461* [1998] was a typical separation of powers game

between the Legislative Yuan and the Ministry of National Defense (Executive Yuan), regarding whether or not the Chief of the General Staff was obliged to be interrogated by the legislators. Ordinarily the Chief of the General Staff claimed to be the President's chief staff member in the military, which meant that he was not obliged to be interrogated by the legislators because the Constitution and its amendments imposed no such an obligation upon the President.<sup>326</sup>

The Chief of the General Staff represented the separation between military command and administration, a Prussian doctrine that the Republican Army had adopted for more than seven decades. He claimed that he was not one of the Ministers of the Executive Yuan and therefore had no obligation to be interrogated by the Legislative Yuan in accordance with the new constitutional amendments.<sup>327</sup> The Legislative Yuan, however, held that the Chief of the General Staff should be a Minister of the Executive Yuan, even though the Legislative Yuan was aware that the Constitution and its amendments embodied no such regulation.<sup>328</sup> The Legislative Yuan therefore petitioned the Judicial Yuan for constitutionality, claiming that the legislators' demand for the power to interrogate the Chief of the General Staff should, according to the genuine spirit of democracy, be the Legislative Yuan's as of right. The Judicial Yuan should therefore support the Legislative Yuan, imposing such an obligation upon the Chief of the General Staff. The Judicial Yuan held:

Article 3, Paragraph 3, Subparagraph 1, of the Amendment to the Constitution, promulgated on July 21, 1997, provides that the Executive

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<sup>326</sup> *Judicial Yuan Interpretation No.461 App'x* [1998].

<sup>327</sup> Constitution of R.O.C. amend. § 3I (1997).

<sup>328</sup> *Judicial Yuan Interpretation No.461 App'x* [1998].

Yuan has the duty to present to the Legislative Yuan a statement on its administrative policies and a report on its administration, while the Legislators may interpellate, during the sessions, the Premier and the heads of ministries and other agencies under the Executive Yuan. [...] Since the Ministry [...] is in charge of affairs concerning national defense, the Legislators may interpellate [...] the Minister of National Defense on the policy statements and administrative reports involving the issues of national defense. The Chief of the General Staff, who is the chief staff member for, and reports directly to, the Minister of National Defense in the administrative system, is not a head of ministry under the Constitution. Therefore, the above provision does not apply.<sup>329</sup>

The Chief of the General Staff, as the chief staff member for the Minister of National Defense, is in charge of important affairs concerning national defense, including the compilation and execution of budgets. Such powers and duties are closely related to the jurisdiction of the Legislative Yuan. Accordingly, the Chief of the General Staff is a government official under Article 67, Paragraph 2, of the Constitution, who may not reject the invitation to be present at the committee meetings unless there is a justifiable reason that relates to the execution of military activities concerning national security. Nevertheless, the Chief of the General Staff does not have to answer questions involving important national defense intelligence.<sup>330</sup>

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<sup>329</sup> *Judicial Yuan Interpretation No.461* [1998] (Official Translation).

<sup>330</sup> *Id.* (Official Translation).

The importance of *Judicial Yuan Interpretation No.461* [1998] is that it shows that the Judicial Yuan can not only impose a constitutional obligation upon the Chief of General Staff, which is beyond the Constitution's original blueprint. This also demonstrates its political and constitutional power in Taiwanese politics. The Justices were like law school professors, lecturing the legislators that:

We the Justices do agree with you the legislators that the Chief of the General Staff should be interrogated; however, the constitutional article that you the legislators applied is wrong. Let us teach you what the correct article is.

*Judicial Yuan Interpretation No.435* [1997]

*Judicial Yuan Interpretation No.435* [1997] was another example of Taiwan's separation of powers games between the Legislative Yuan and the Judicial Yuan (primarily, although the Ministry of Justice and the Executive Yuan were also involved), concerning the extent of legislative privilege. The Legislative Yuan challenged the Judicial Yuan to confirm that legislative privilege was embodied in the Constitution<sup>331</sup> and that privilege should therefore include all kinds of legislative conducts.<sup>332</sup> The Legislative Yuan also demanded that the Judicial Yuan should confirm that no legislator could be prosecuted (Ministry of Justice) or tried (courts) in accordance with Article 73 of the Constitution. However, the Justices dismissed this appeal and held:

To ensure that a member feels less inhibited when acting as a member,  
the boundaries of the immunity of speech conferred by the Constitution

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<sup>331</sup> Constitution of R.O.C. § 73 (1947).

<sup>332</sup> *Judicial Yuan Interpretation No.435 App'x* [1997].



should be construed as liberally as possible. Accordingly, all statements, questioning, motions, voting and directly related conduct made in sessions or committees, such as party negotiations and statements expressed in public hearings, should thereby be protected. However, conduct beyond such extent and irrelevant to the exercise of the member's authority is not protected, such as the use of an intentional physical movement that is obviously improper to express opinions and that impairs others' legally protected interests. Whether a member's conduct transgresses the protective boundaries in a specific case should be subject to the decision of the Legislative Yuan based upon its self-disciplinary practice in maintaining congressional order. But, for the purpose of maintaining the social order and protecting a victim's rights, the judiciary can also exercise its authority to investigate and adjudicate such conduct if necessary.<sup>333</sup>

The Justices' admonition to the legislators was clear: legislative privilege would be secured – but this did not mean that the Judicial Yuan would tolerate any improper legislative conduct.

*Judicial Yuan Interpretation No.325 [1993]*

*Judicial Yuan Interpretation No.325 [1993]* was certainly the most symbolic of all the separation of powers games raised because of the promulgation of the Additional Articles of the Constitution 1992.<sup>334</sup> The Legislative Yuan claimed that the Control

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<sup>333</sup> *Judicial Yuan Interpretation No.435 [1997]* (Official Translation).

<sup>334</sup> Constitution of R.O.C. amend. (1992).

Yuan was no longer a house of congress after the Constitution was amended by the Additional Articles of the Constitution 1992, so the Control Yuan's congressional power of investigation should be transferred to the Legislative Yuan.<sup>335</sup> The legislators also complained that it was extremely irrational that the Legislative Yuan, as the genuine house of representatives, had no such power, considering that the original senate, the Control Yuan, was suspended before national reunification.<sup>336</sup>

[Having the congressional power of investigation] is important because it is about whether the Legislative Yuan is able to play its role properly by fully exercising the power given by the Constitution. [...] The superiority of the executive power is a trend that cannot be stopped, so it is important to confirm that the congressional power of investigation is the Legislative Yuan's necessary and auxiliary legislative power.<sup>337</sup>

The Justices tried to maintain the favour of both the Legislative and Control Yuan(s). On one hand, the Justices confirmed that the Control Yuan's investigatory power should not be taken away because the Constitution and its amendments were not designed to do this; on the other, the Justices granted the legislators their desired congressional power of investigation via judicial authority and held:

In addition to the National Assembly, the Constitution has established five Yuans to be in charge of the executive, legislative, judicial, examination, and control powers, all of which are the highest authorities

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<sup>335</sup> *Judicial Yuan Interpretation No.325 App'x* [1993].

<sup>336</sup> After the Chinese Civil War in 1949, Taiwan became only 1 out of 37 member states of the ROC, so the Control Yuan, as the original Senate of the ROC, was suspended and its function altered towards an administrative supervision organ before national reunification.

<sup>337</sup> *Judicial Yuan Interpretation No.325 App'x* [1993] (Instrument of Appeal) (Author's Translation).

of the country, and their respective powers are mainly delineated by the Constitution. This is not entirely similar to the separation-of-powers system adopted in other countries. The question as to which entity is the equivalent of a “congress” in a democratic country is not necessarily intrinsically related to the delineating of powers amongst the five Yuans. The amended provision in the Amendment has not made changes to the five-yuan system, nor has it enlarged the powers of the Legislative Yuan. Since no amendment is made to the censure and impeachment powers exercisable by the Control Yuan where it considers the central or local public servants negligent or in breach of law, the power of rectification which is confined to the Executive Yuan and its relevant divisions and the investigative power granted by Articles 95 and 96 of the Constitution for the exercise of the said power, such power should nevertheless be exercised exclusively by the Control Yuan.<sup>338</sup>

In order for the Legislative Yuan to maximize its functions [...] the legislators can be questioned or can raise questions at the meetings and acquire an understanding of the relevant matters from the explanations or opinions proffered by the persons being so questioned or the attendees in response to the subject matter in question. Where something is still not clear, they can [...] request the relevant authorities to provide reference materials with respect to issues involved in the subject matter under discussion. Where necessary, the Legislative Yuan may request for review of the original documents so as to comply with the constitutional

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<sup>338</sup> *Judicial Yuan Interpretation No.325* [1993] (Official Translation).

provisions with respect to the exercise of powers by the legislators in meetings. The authority being so requested may not decline such request unless in accordance with the laws or for other justifiable reasons.<sup>339</sup>

## 7.4.2 The Executive Yuan

In contrast to the Legislative Yuan, the Executive Yuan rarely brought suits itself (4 cases), was frequently being sued by other powers between 1990 and 1999 (18 cases). Of the separation of powers games involving the Executive Yuan (22 out of 39 cases: 56.41%), the Executive Yuan made a record 10 approvals (45.45%), 11 dismissals (50.00%) and 1 political-question dismissal (4.55%). Moreover, the Executive Yuan as appellants (4 cases), only filed lawsuits against the Administrative Court (2 wins and 1 loss) and the Legislative Yuan (1 win). This statistic illustrates the Executive Yuan's attitude towards the separation of powers games, and shows that the judiciary (mainly the Administrative Court) was more threatening than the legislature.

## 7.7 The Executive Yuan's Records over the Separation of Powers Games, 1990-1999

<b>TOTAL</b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b><i>Appellant</i></b>	3	1	0	0
<b><i>Respondent</i></b>	7	10	0	1
<b><i>against THE LEGISLATIVE YUAN</i></b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b><i>Appellant</i></b>	1	0	0	0
<b><i>Respondent</i></b>	6	9	0	1
<b><i>against THE JUDICIAL YUAN</i></b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b><i>Appellant</i></b>	2	1	0	0

<sup>339</sup> Id. (Official Translation).

<b>against THE EXAMINATION YUAN</b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b>Respondent</b>	0	1	0	0
<b>against CITY COUNCILS OF TAIPEI &amp; KEELUNG</b>				
	<i>Win</i>	<i>Lose</i>	<i>Draw</i>	<i>Political</i>
<b>Respondent</b>	1	0	0	0

(Source: Compiled by the author)

When reviewing the Executive Yuan's separation of powers games, a quick glance might easily conclude that the Executive Yuan was politically powerful in comparison to the other powers, even though it was restrained quite effectively by the Administrative Court. The Executive Yuan mainly appealed against the Administrative Court (75%) and mostly responded to lawsuits conducted by the other powers. *Judicial Yuan Interpretation No.307* [1992], for instance, was a typical separation of powers game against the Executive Yuan, brought by the City Councils of Taipei and Keelung together, complaining that the Executive Yuan budgeted for their metropolitan police, which amounted to an unconstitutional administration.<sup>340</sup> The Justices concluded that:

For the matters over which the central government delegates the power of administration to the provincial or *hsien* governments, the central government shall cover such matters in its own budget according to the legal procedures. [...] However, pursuant to Article 109, Paragraph 1, Subparagraph 10, and Article 110, Paragraph 1, Subparagraph 9, of the Constitution, the provincial government has jurisdiction over the administration of provincial police, while *hsien* governments have jurisdiction over *hsien* police and security.<sup>341</sup>

<sup>340</sup> *Judicial Yuan Interpretation No.307 App'x* [1992].

<sup>341</sup> *Judicial Yuan Interpretation No.307* [1992] (Official Translation).

The Justices played an artful political role as arbitrator in *Judicial Yuan Interpretation No.307* [1992], convincing the City Councils of Taipei and Keelung that beneath the Executive Yuan's veneer of victory in this case, the Executive Yuan was actually the loser in political terms:

In terms of the budget issue, the Judicial Yuan holds that the Executive Yuan is right; however, in terms of the control power, the Justices affirm that the City Councils are the bodies in control. Henceforth the Executive Yuan is entitled to budget the police without claiming control power, so why not just appreciate this gift?

### **7.4.3 The Judicial Yuan**

The Judicial Yuan, as the ultimate trial organ and political mediator within Taiwan's political system, is theoretically incapable of bringing actions or of being sued against by other powers (Weng, 1998: 288-290). However, the judiciary was sued five times, for unconstitutionality by the Executive Yuan (3 cases) and the Legislative Yuan (2 cases) between 1990 and 1999, although the judiciary *de facto* sued nobody in return or for any other reason. From the 1990s, it appears that the Executive Yuan mainly aimed its lawsuits against the judiciary at the Administrative Court (Supreme Administrative Court since 2000) because of the Executive Yuan's discontent over the decisions the Administrative Court had made. In contrast, the Legislative Yuan mostly challenged the whole of the judiciary in the Judicial Yuan, asking the Judicial Yuan to circumscribe the inferior courts. These two patterns illustrate the role of the Judicial Yuan from different angles.

Of all the lawsuits brought against the judiciary, *Judicial Yuan Interpretation No.371* [1995] is undoubtedly the most important separation of powers game between the Legislative Yuan and the Judicial Yuan. The conflict came about due to the Judicial Yuan's decision to grant all the inferior courts the power of constitutional judicial review, which the Legislative Yuan would not accept. The Legislative Yuan therefore brought a lawsuit against the Judicial Yuan directly, asking the Judicial Yuan to withdraw from its original position.<sup>342</sup> Once again, the Justices played a clever role in politics, withdrawing the Judicial Yuan's original position on the one hand, and granting all inferior courts the power of constitutional judicial review by implication on the other. On the surface the Legislative Yuan appeared victorious, but the judiciary was actually the real winner. The Justices held:

A judge shall have no capacity to hold a statute unconstitutional, and shall not refuse to apply a statute for that reason. Nonetheless, since the Constitution's authority is higher than the statute's, judges have the obligation to obey the Constitution over any other statutes. Therefore, in trying a case where a judge, with reasonable assurance, has suspected that the statute applicable to the case is unconstitutional, he shall surely be allowed to petition for interpretation of its constitutionality. In the abovementioned situation, judges of different levels may suspend the pending procedure on the ground that the constitutionality of the statute is a prerequisite issue. At the same time, they shall provide concrete reasons for objectively believing the unconstitutionality of the statute,

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<sup>342</sup> *Judicial Yuan Interpretation No.371 App'x* [1995].

and petition to the Grand Justices of the Yuan to interpret its constitutionality.<sup>343</sup>

When the author of this thesis was a law school student in Taiwan, he asked his mentor, Nigel N.T. Li, whether the inferior courts were granted the power of constitutional judicial review or not? The author still remembers Li's response:

If you were a judge and you made the decision to suspend a trial because you think the law is unconstitutional, are you judicially reviewing the law or not?

## **7.5 INTRA-BRANCH CONFLICTS**

It is interesting that the Judicial Yuan has often been involved with intra-branch conflicts in Taiwan's national-level legislatures, including the Legislative Yuan and the National Assembly. The Justices have played the role of political mediators and legal advisors amongst politicians, settling Taiwan's contentious political controversies by judicial means (Hirschl, 2004: 71-108). Such a convention illustrates the political weight of the Judicial Yuan, even though there were only 9 cases within this category between 1990 and 1999.

The best approach to understanding the role of the Judicial Yuan within these intra-branch conflicts is not by statistics, nor by quantitative analyses, but by case study, examining a specific case, *Judicial Yuan Interpretation No.342* [1994]. This represented

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<sup>343</sup> *Judicial Yuan Interpretation No.371* [1995] (Official Translation).



a litigation appealed amongst congressmen/women of the New Party,<sup>344</sup> the Democratic Progressive Party and the Nationalist Party with regard to the abuse of legislative power.

### **Bone of Contention: Democratisation**

The case arose in the course of Taiwan's democratisation due to the abolition of war establishments against the PRC in 1990. It began with a fierce debate on the continuing utilisation (after democratisation) of the disputed three executive organs established according to the authorisation of the Temporary Provisions Effective during the Period of Communist Rebellion from 1948 to 1966. These executive organs included the National Security Council (established without legislation in 1952), the National Security Bureau (established without legislation in 1955) and Bureau of Personnel Administration (established in 1967). These three executive organs lacked any constitutional authorities pursuant to the Constitution, thus becoming unconstitutional organs after the Temporary Provisions 1948/1972 was nullified in 1991.

The ROC has become a constitutional state via the enforcement of the Constitution in 1947; however, it experienced a communist revolution in the Chinese mainland, thus promulgating the Temporary Provisions<sup>345</sup> that were in effect during the communist rebellion in 1948, with four additional modifications amended in 1960, 1966a, 1966b and 1972. The 1966b Temporary Provisions authorised the President to organise additional executive organs<sup>346</sup> for the war establishment, overriding the original

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<sup>344</sup> The New Party was an active political party in the 1990s.

<sup>345</sup> Temporary Provisions Effective during the Period of Communist Rebellion (1948).

<sup>346</sup> Temporary Provisions Effective during the Period of Communist Rebellion § 5 (1948/1966b).

constitutional limitation during the period of communist rebellion, and placing a legal condition that these additional executive organs should be dismissed immediately the period of communist rebellion ended, which it did on 1 May 1991.

However, the Additional Articles of the Constitution 1991, which legally replaced the Temporary Provisions of 1972, controversially allowed these three executive organs to remain in existence if the President (National Security Council and National Security Bureau)<sup>347</sup> and the Premier (Bureau of Personnel Administration)<sup>348</sup> held it to be necessary. In other words, the Legislative Yuan had no power to determine whether the disputed executive organs should cease to exist or not. On the contrary, it would be responsible for reviewing the relevant organisation bills if these executive organs were allowed to remain.<sup>349</sup>

## **Fact**

The ambiguity of the Article 9III of the Additional Articles 1991 set off a political storm firstly within the Legislative Yuan, and eventually into constitutional litigation. The Article regulated that the three disputed executive organs ought to be reorganised by new acts of congress based upon the authority of the Constitution and the Additional Articles, thereby providing a deadline for the application of the original organisation laws authorised by the Temporary Provisions 1966b/72 – 31 December 1993. However, this Article could be interpreted differently: either it burdened the Legislative Yuan with a constitutional obligation to pass these organisations' bills before 31 December 1993

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<sup>347</sup> Constitution of R.O.C. amend. § 9I (1991).

<sup>348</sup> Constitution of R.O.C. amend. § 9II (1991).

<sup>349</sup> Constitution of R.O.C. amend. § 9III (1991).

because the power of establishing or abolishing these three executive organs belonged to the President and the Premier, or it implied that the Legislative Yuan was entitled to grant (or not grant) legislative permissions over the continuing utilisation of the disputed executive organs through the legislative courts.

Unfortunately, the Legislative Yuan had no common consensus until 30 December 1993, and the ruling nationalist congressmen/women were out of patience. It was the nationalists who ignored the normal procedures of assembly, including the second and third readings; however, it was also true that members of the opposition New Party and the democrats were busily engaged in ‘legislative brawling’ against the nationalist congressmen/women in order to paralyse the assembly. In the end, these three contentious bills were passed by the Chairman’s declaration at 12:33 PM on 30 December 1993, and promulgated by the President that same afternoon.<sup>350</sup>

Both the New Party and the democratic congressmen/women claimed that the Chairman’s conduct was unconstitutional, and they decided to bring this political conflict to the Judicial Yuan. Meanwhile, the nationalist congressmen/women also claimed that the conduct of the opposition party’s congressmen/women was unconstitutional, so they too decided to request a judicial decision from Judicial Yuan. Eventually, all the political parties involved appealed to Judicial Yuan.

### **Instrument of Appeal – New Party’s Proposal<sup>351</sup>**

The instrument of appeal promoted by congresswoman Hsieh Chi-Ta was co-signed by

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<sup>350</sup> *Judicial Yuan Interpretation No.342 App’x* [1994].

<sup>351</sup> *Id.*

58 congressmen/women, including 8 nationalists, 39 democrats, 6 New Party members, 1 social democrat and 4 independent congressmen. Although the instrument was *de facto* supported by multi-party advocates, it is normally considered as a New Party-based appeal because its main promoter, congresswoman Hsieh Chi-Ta, was a member of the New Party caucus, and all the New Party congressmen/women co-signed the appeal.

This instrument of appeal claimed that there had been no second and third readings of the bills in contention because the congressmen/women were busy with ‘legislative brawling’ in the Legislative Yuan. Therefore, the Chairman acted unconstitutionally by passing these contentious bills without proper legislative procedure. Moreover, this instrument of appeal also challenged the President, claiming that he had no power to promulgate either undetermined or disputed bills, and that those bills in question that the President already promulgated should be nullified immediately.

### **Instrument of Appeal – Democratic Proposal<sup>352</sup>**

Unlike congresswoman Hsieh Chi-Ta’s instrument of appeal, which was co-signed by 8 congressmen/women from the then ruling Nationalist Party, the instrument of appeal promoted by congressman Lin Cho-Shui was co-signed by 56 opposition-party congressmen/women, including 49 democrats, 5 New Party members, 1 social democrat and 1 independent congressman. Congressman Lin Cho-Shui was one of the leading members of the Democratic caucus, and his instrument of appeal is commonly held as the democratic proposal because 49 out of 51 democratic congressmen/women

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<sup>352</sup> Id.

supported it.

This instrument of appeal confirmed that the Chairman of the Legislative Yuan had announced the commencement of both the second and the third readings; however, the appeal was on the grounds of the Self-Stipulated Rules of Assembly, and claimed that neither reading complied with the Rules because the congressmen/women were busy ‘legislative brawling’ all the time. The appeal claimed that ‘legislative brawling’ was not a qualified procedure under which to review bills in accordance with the Rules of Assembly, and that the three bills should be prevented from being enacted. Based upon the above claim, the instrument of appeal further challenged the President, claiming that he would be unconstitutional in promulgating any undetermined bills of this act.

### **Instrument of Appeal – Nationalist Proposal<sup>353</sup>**

The instrument of appeal promoted by congressman Liao Hwu-Peng was co-signed by 60 congressmen/women, all of whom were nationalists. Even though it is self-evident that this instrument of appeal was a purely nationalist proposal, it should be specified that only 60 out of 97 congressmen/women from the Nationalist Party co-signed it. Moreover, 4 nationalist congressmen co-signing nationalist and New Party’s proposals, as well as another 4, who only gave their signatures to the New Party.

The nationalist instrument of appeal blamed the democrats and the New Party congressmen/women for deliberate legislative omission through the use of ‘legislative brawling’, which the nationalists claimed to be unconstitutional. Article 9III of the 1991

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<sup>353</sup> Id.

amendments provided a deadline (31 December 1993) for the invalidation of the original laws; however, the congressmen/women were still busy ‘legislative brawling’ until 30 December 1993, instead of bringing in new laws. Based upon this, the nationalists claimed that either the bills in contention must be passed before the deadline (the nationalists had sufficient votes), or all congressmen/women were unconstitutional through deliberate omission. In other words, the nationalists claimed that it was better to violate the Self-Stipulated Rules of Assembly than to ignore the deadline given by the Constitution. Moreover, the nationalists further defended the President, claiming that the President had no obligation to confirm to bills of act passed by the Legislative Yuan. As long as he received it from the Legislative Yuan, he was entitled to promulgate it.

## **Decision**

The Judicial Yuan backed parliamentary privilege and applied the principle of gravity defect control within this case, drawing up the court’s criterion of reviewing legislative procedure (Wu, 2004: 406-407). The court’s substantial decision was in favour of the nationalists, though its genuine purpose was to introduce the concept of parliamentary privilege into the Legislative Yuan.

The court’s majority opinion held that the Legislative Yuan, based upon the separation of powers doctrine, should pass the bill according to its own self-stipulated rules within the scope of the Constitution, including ‘the rules of organization of the Legislative Yuan, the rules of assembly and the customs and practices of assembly’.<sup>354</sup> This meant

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<sup>354</sup> *Judicial Yuan Interpretation No.342 Reasoning* [1994].

that the court would not interfere with an act of congress because of any procedural imperfection, unless this imperfection fell within the scope of the Constitution:

Whether the Legislative Yuan is in compliance with the procedure stipulated in its rules of assembly, its review of bills of act is an internal matter, unless it is in violation of the Constitution, and it shall fall into the scope of the parliamentary autonomy instead of being reviewed by the authority responsible for the constitutional interpretation [...]<sup>355</sup>

It is obvious that the court did not intend to create further rules of assembly for the Legislative Yuan, because it wanted to get rid of this political conflict. However, the court also knew that congressmen/women in the future, whenever there was political conflicts between each other within the Legislative Yuan, would keep requesting answers from the court if the court failed to lecture them the concept of parliamentary privilege. The court thus constituted a double safeguard against the politicians' abuse of legislative power (by gravity defect control), as well as their manipulation of judicial power for political conflict (by parliamentary privilege). The Justices held:

Where the procedures for enactment of the laws can be determined to be in contravention to the Constitution without investigation into the facts, i.e., where there are palpable material defects which are against the fundamental rules of enactment of laws, the authority responsible for constitutional interpretation may still declare it void. Where there is a dispute as to whether the defect is sufficient to affect the enactment of

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<sup>355</sup> Id. (Official Translation).

the laws to a grave extent and investigation is required, i.e., where it is not evident and, according to the current regime, the investigation of the facts thereof by the authority responsible for constitutional interpretation is subject to constraints, then the dispute shall be resolved in accordance with the autonomy rule of the Legislative Yuan.<sup>356</sup>

Finally, the court found in favour of the nationalists' proposal in terms of the President's power of promulgation, holding that the President was entitled to promulgate a bill of act he received from the Legislative Yuan with no responsibility to confirm whether it had been firmly passed or not.

## **7.6 NON-PARTISAN CASES**

The best way of learning the merits of non-partisan cases in Taiwan is by examining the nature of the questions asked, as the result of these questions reflected the political weight of the Judicial Yuan from the questioners' perspectives. From 1990 to 1999 there were only 10 non-partisan cases; however, the questioners consisted of the President (1 case), all of the Pentapartite powers (1 case each except the Examination Yuan for 2 cases), the City Councils of Taipei and Kaohsiung (1 case each) and the Provincial Assembly of Taiwan (1 case).

Most non-partisan-question cases raised between 1990 and 1999 were impressive because the Judicial Yuan was being asked by the appellant organs to 'amend' the Constitution by judicial means. Hence, it is interesting in the realm of mega-politics

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<sup>356</sup> *Judicial Yuan Interpretation No.342* [1994] (Official Translation).



because these appellant organs found it easy to transfer power to the court. Why did these organs prefer to lean politically towards a judicial constitution instead of determining their own business arbitrarily?

The President asked the Judicial Yuan with regard to his nomination power over the Justices of the Judicial Yuan in *Judicial Yuan Interpretation No.470* [1998]. He did this by virtue of the failure of the Additional Articles of the Constitution 1997<sup>357</sup> to specify the nominations between 1997 and 2003, asking the Justices to amend the Constitution via judicial power. The Legislative Yuan's question was even more unbelievable – the legislators petitioned the Justices for guidance as to how to amend the Civil Code on *Judicial Yuan Interpretation No.365* [1994], thus they received an impatient response from the court:

Finally, as for the Legislative Yuan's submission of an official letter titled Tai-Yuan-Yi No. 2162 to this Yuan on July 26th of this year (1994), in which the former Yuan sought to obtain this Yuan's opinion on whether Members of that Yuan are qualified to propose future amendments to the unconstitutional Article 1089 of the Civil Code, the request made is not in conformation with Article 4, Paragraph 1, Subparagraph 1, of the Constitutional Interpretation Procedure Act.<sup>358</sup>

Meanwhile the City Council of Taipei in *Judicial Yuan Interpretation No.259* [1990], as well as the Provincial Assembly of Taiwan in *Judicial Yuan Interpretation No.260* [1990], demanded that the Judicial Yuan confirm their autonomous positions via

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<sup>357</sup> Constitution of R.O.C. amend. (1997).

<sup>358</sup> *Judicial Yuan Interpretation No.365 Reasoning* [1994] (Official Translation).

judicial power, considering that there was no Local Government Act enacted according to the Constitution. The Judicial Yuan confirmed that all local governments were entitled to the right of autonomy. However, they imposed an obligation of enacting the relevant acts upon the Legislative Yuan. The Justices held:

Article 118 of the Constitution expressly stipulates that the self-governance of a special (Executive-Yuan-governed) municipality shall be prescribed by law. However, the abovementioned law has not yet been enacted, and the existing organization of special municipalities and the administration of local self-governance matters are governed by laws of the Central Government. To render the constitutional intent of local self-governance effective, there shall be enacted laws for the special municipalities' self-governance, taking into consideration the practical circumstances. Until such laws are enacted, the existing laws of the Central Government shall remain in effect.<sup>359</sup>

## **7.7 CONCLUSION**

Pursuant to Article 78 of the Constitution, the Judicial Yuan is vested with the power to interpret the Constitution, and to provide uniform interpretations with respect to statutes and ordinances. The intent is to have the Judicial Yuan assume the responsibility of clarifying and enunciating the correct meaning of the Constitution and statutes and ordinances. The interpretations thus rendered shall be binding upon

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<sup>359</sup> *Judicial Yuan Interpretation No.259* [1990] (Official Translation).

every institution and person in the country, and each institution shall abide by the meaning of these interpretations in handling relevant matters. Prior precedents which are contrary to these interpretations shall automatically be nullified.<sup>360</sup>

*Judicial Yuan Interpretation No.185* [1984] directly claimed that the power of the Judicial Yuan over judicial review was part of the Constitution, and that any decision made by the Judicial Yuan would be legally binding. When we see that the Judicial Yuan could interpret its judicial review power to the extent that the Constitution is almost ‘what the judges say it is’ (Hughes, 1908: 139), we realise that judicial power expansion in Taiwan is not unrealistic as long as the Justices can find a proper way to exercise power in politics. The Constitution provides massive levels of power to the Judicial Yuan, and all the Justices have to do is to play a good role strategically in the field of mega-politics (Hirschl, 2004: 71-108), that is, by constructing a convention in Taiwan that state organs and individuals must rely on the Judicial Yuan’s judicial review for settling contentious political controversies.

There are many reasons why such a constitutional convention exists. Despite the constitutional design, the Judicial Yuan’s political credibility is also relevant. Since *Judicial Yuan Interpretation No.261* [1990], the court has established a positive image for itself in terms of justice amongst the public, so the potential for judicial arbitration over contentious political controversies has greatly increased. Moreover, the government’s authoritarian tradition of following superior authority is definitely crucial – the officials are used to complying with orders given by their superiors, thus providing

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<sup>360</sup> *Judicial Yuan Interpretation No.185 Reasoning* [1984] (Official Translation).

a motion to petition the Judicial Yuan for judicial determinations instead of making their own decisions. In other words, ROC officials traditionally prefer to be subject to the law. They will administer the law, but they will not decide what the law is; therefore, if there is any doubt as to what comprises the genuine spirit of the law, or if there is no law, the officials would rather pursue an order authorised by their superiors, and as far as Taiwan is concerned there is no greater superiority than the Judicial Yuan.

## 8: JUDICIAL POWER EXPANSION: PUBLIC OPINION AND HUMAN RIGHTS

### 8.1 INTRODUCTION

Since Taiwan's democratic transition, the protection of human rights has become an unchallengeable political value. However, much of the previous research fails to distinguish sincere human rights protection from strategic human rights protection. In other words, previous studies of Taiwan's Judicial Yuan have made no conclusion as to whether the Justices safeguarded human rights for strategic or humanitarian reasons – or indeed for a combination of both. Some academics argue that the Judicial Yuan is and always has been 'an institute for democracy and human rights' (Ginsburg, 2003: 106) whilst others hold that the Justices were not always liberal (Li, 2012: 340) in the 1990s.

How is it that the Judicial Yuan receives such polarised comments on human rights? Such a puzzle surely encourages us to question the Justices' sincerity in terms of human rights protection, and reminds us of the third of four 'but for' causations embodied in the methodology chapter (Chapter 3.3) – If the Justices never considered public opinion as their political source for judicial power expansion, they would not have to educate the public on higher fundamental rights standards.

Justice Mohammed Bedjaoui of the International Court of Justice argues that 'there is an indissoluble link between underdevelopment and the violation of human rights, and at the same time there is a definite equation between development and the observance of human rights' (Bedjaoui, 2000: 42). In Taiwan's case, the country was

underdeveloped in the 1990s,<sup>361</sup> so there was nothing wrong in the Justices introducing fresh standards of human rights. However, the introduction of human rights standards was not unconditional, as the Justices always shied away from introducing any standard that may arise public anger (*see also* Chapter 9).

Taiwan's policies on human rights protection in the 1990s can be classified into two categories: Rights that the Justices introduced to the public in order to shape public opinion),<sup>362</sup> and rights that Justices changed in law in accordance with public preferences. Both categorisations imply that the Justices' strategies never went beyond public preferences. In other words, the Justices in the 1990s did protect human rights, but only after they had secured public support in order to maximise their political influence (judicial power expansion).

In terms of special power relationships (Krüger and Ule, 1956: 109-226), it is obvious that the Justices were attempting to shape public opinion, and that such Prussian legal tradition ought to be abolished because of the sincerity of human rights protection. The Prussian legal tradition had been applied in the ROC's own legal system since 1929, and comprised a sound logical construction that makes cultural sense in Taiwan. As such, it is hard to believe that the people of Taiwan – who had been politically liberated from an authoritarian regime in a period of less than 10 years – would have realised that the application of a special power relationship might constitute an infringement against human rights. It is more probable that the Justices' attempted to introduce the public to

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<sup>361</sup> Taiwan was been broadly accepted as a developed economy from the year 2000; in the 1990s, Taiwan was in the first decade of democratisation. Hence, I find no reason not to address it as 'underdeveloped'.

<sup>362</sup> This thesis has no intention of arguing whether the Judicial Yuan has ability to shape public opinion or not; however, according to Unger's idea (Unger, 2007: 7-12), the Judicial Yuan attempted to shape public opinion in the same way that law school professors teach their students. So, the core of this thesis is essentially why the Judicial Yuan behaved like law school professors in some cases, and why did they attempt to shape public opinion?

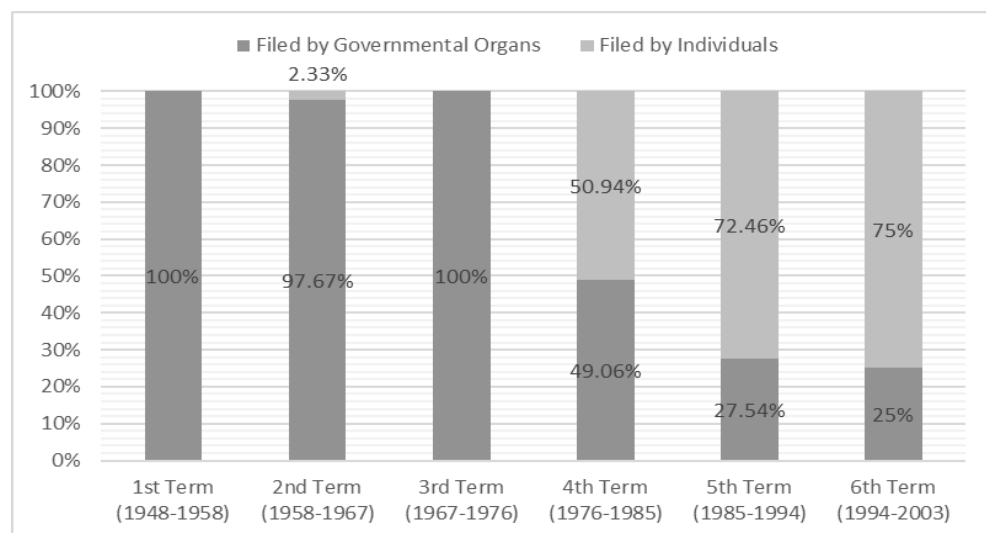
the concept of human rights protection in order to win public support.

In terms of prosecutors' power of custody, the Justices deliberately changed the civil law tradition because of Taiwanese public preference, holding that it was a violation against human rights if the prosecutors had the power to detain. However, prosecutors' power to detain is commonly exercised in many civil law countries even today. Hence, it is not a persuasive argument to say that the ROC abolished this legal tradition because of human rights concerns. It is more likely to be a strategic judicial decision.

## 8.2 STATISTICS

In the long run, the Judicial Yuan's attention had shifted gradually according to the statistics, as can be seen by Figure 8.1:

**8.1 Classification of Cases Reviewed, 1948-2003**

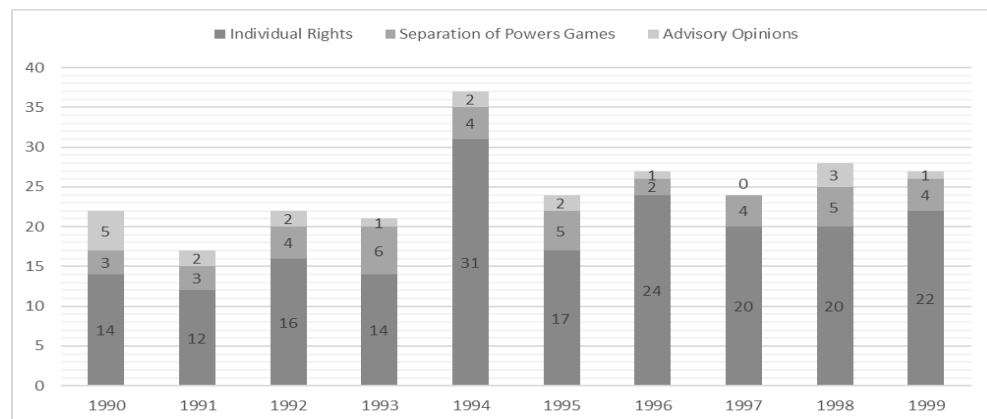


(Source: Compiled by the author)

The chart indicates that the audience of the Judicial Yuan before 1976 was made up

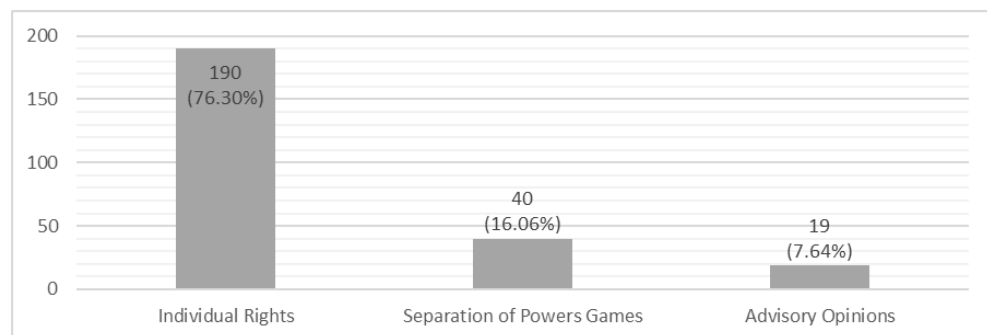
from governmental organs, but that from the fourth-term the Judicial Yuan became more accepting of appeals filed by individuals. Apart from proof of direct causation, this may reflect a crucial historical event that happened in Taiwan – President Chiang Kai-Shek’s death on 5 April 1975.

## 8.2 Classification of Cases Reviewed (per Annum), 1990-1999



(Source: Compiled by the author)

## 8.3 Classification of Cases Reviewed, 1990-1999



(Source: Compiled by the author)

Statistics show that the Judicial Yuan reviewed 190 (out of a total of 249) cases that concerned individual rights between 1990 and 1999, accounting for 76.30% of the total. Of all these 190 cases, the Justices scored 91 wins and 99 losses (47.89% to 52.11%).



#### 8.4 Judicial Reviews Filed by Individuals, 1990-1999

<i>Year</i>	<i>Win</i>	<i>Loss</i>	<i>Odds (%)</i>
<i>1990</i>	6	8	42.86%
<i>1991</i>	7	5	58.33%
<i>1992</i>	4	12	25.00%
<i>1993</i>	8	6	57.14%
<i>1994</i>	12	19	38.71%
<i>1995</i>	7	9	43.75%
<i>1996</i>	12	12	50.00%
<i>1997</i>	10	10	50.00%
<i>1998</i>	14	6	70.00%
<i>1999</i>	11	11	50.00%
<b><i>Total</i></b>	<b>91</b>	<b>99</b>	<b>47.89%</b>

(Source: Compiled by the author)

The Justices' preferences between 1990 and 1999 can also be seen from the statistics:

#### 8.5 Categories of Cases Filed by Individuals, 1990-1999

<i>Categorisation</i>	<i>Sum</i>	<i>Win/Loss</i>	<i>Odds</i>
<i>Property Rights</i>	44	18:26	40.91%
<i>Tax Law</i>	42	12:30	28.57%
<i>Right of Legal Actions</i>	24	12:12	50.00%
<i>Right to Work</i>	20	6:14	30.00%
<i>Gesetzesvorbehalt</i> <sup>363</sup>	15	13:2	86.67%
<i>Special Power Relationship</i>	10	10:0	100%
<i>Habeas Corpus</i>	6	5:1	83.33%
<i>Urban Planning</i>	5	3:2	60.00%
<i>Personal Law</i>	4	2:2	50.00%

<sup>363</sup> Gesetzesvorbehalt is a German legal concept which is the complete opposite of the British royal prerogative. There is no similar concept in English. It means the executive body is prohibited from making a decision unless there is an act of the legislature to support it.

<i>Suffrage</i>	3	1:2	33.33%
<i>Mainland Chinese Affairs</i>	3	0:3	0%
<i>Assembly and Association</i>	2	2:0	100%
<i>Personal Rights</i>	2	2:0	100%
<i>Equality</i>	2	2:0	100%
<i>Transitional Justice</i>	2	1:1	50.00%
<i>Capital Punishment</i>	2	0:2	0%
<i>Freedom of the Press</i>	1	1:0	100%
<i>Proportionality</i>	1	0:1	0%
<i>Religion against Nationalism</i>	1	0:1	0%

(Source: Compiled by the author)

There is no doubt that the Justices' preference for democratic transition is conspicuous between 1990 and 1999, where the statistics shows that the odds on issues of special power relationship, assembly and association, freedom of the press, equality and personal rights are 100%, whilst the odds on the issue of *habeas corpus* and Gestzesvorbehalt are over 80%. Conversely, in cases regarding property rights, the right to work, tax laws and right of legal actions, the Justices were generally quite conservative. It is obvious that the Justices sought to reconstruct the relationship between the country and its people via democratic transition. However, they also placed a very strong priority on issues of national security – in terms of mainland Chinese affairs and religion opposing nationalism, the result was absolute.

In comparison with the Justices' strong preference for *habeas corpus* (odds: 83.33%), the Justices were mercilessness upon capital punishment (odds: 0%), which appears

paradoxical. How can a court with a strong preference for *habeas corpus* show no mercy on the capital punishment issue? The influence of public opinion is probably the only reasonable answer.

### **8.3 PRINCIPLE OF ANTI-SPECIAL POWER RELATIONSHIP**

Before discussing the connotation of the principle of special power relationships and the reason why this principle was eventually derogated in Taiwan, a question of implied judicial behaviour should be answered first:

What makes a judge consider overriding a legal convention which is culturally validated and has been in force for more than 60 years; especially if the judge has to reflect the public's opinion that overriding this legal convention is wrong?

The first possibility that a judge is willing to do this is undoubtedly based on a strategic decision for personal interest, that by overriding something archaic and/or unfair he or she may earn a good name (Garoupa and Ginsburg, 2009: 452-457). The second possibility is that judge simply holds that the old legal convention wrong and has a sincere reason for overriding it. In order to distinguish strategic decisions from sincere decisions, this thesis argues that the best approach is to observe how a judge makes a decision by examining the wording. If a judge strikes down a legal convention directly and completely, it probably reflects a sincere decision that judge really disagreed with the convention. However, if the judge only holds the convention wrong on a case-by-case basis – even though there are no cases found in which the judge has approved the convention – it is likely that judge makes decisions carefully and strategically in this field, in the belief that the underlying convention may prove correct at times.

Did the Justices of the Judicial Yuan in the 1990s oppose the application of the special power relationship? The author of this thesis believes that they did, and this was also the common consensus of Taiwan's Law Society. However, the Justices derogated the principle on a case-by-case basis, from public functionaries to students, soldiers and sailors, dispelling cultural prejudices that the application of the principle was neither proper nor just whilst inculcating the mass public strategically with the Justices' idealism concerning human rights. This tells us that the Justices did not make decisions sincerely. In contrast, they were trying to lead public opinion in their own vision of Utopia.

### **8.3.1 Public Functionaries: Pre-1990 Judicial Reviews**

Taiwan's first constitutional judicial review referring to the application of the special power relationship principle is the *Judicial Yuan Interpretation No.187* [1984]. In this case the appellant, Lieutenant Zhang Long-Cheng, had his request for a certification of his working period rejected by the Ministry of National Defense. As a result, his right to a pension was revoked. However, the Administrative Court stood in favour of the principle of the special power relationship, holding that the appellant, as a lieutenant in the army, had no right to file an administrative lawsuit against the ministry under any circumstances. As such, the Administrative Court's only option was to dismiss this appeal procedurally.<sup>364</sup>

The Administrative Court's decision in this case symbolises and reflects Taiwan's

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<sup>364</sup> *Administrative Court Decision, 71 Ruling No.271* [1982].

nationalist Chinese legal tradition, as well as its deep-rooted German jurisprudential influence. However, the Justices of the Judicial Yuan attempted to reverse this German legal principle and held that:

[C]ivil servants are under the obligation to abide by the law and orders of the authority that are within the scope of their duty, unless the said orders are obviously against the law or exceed the authority's scope of supervision. Subordinate civil servants may only put forward their views in disagreement, but may not appeal under the Administrative Appeal Act. [...] Other than the aforementioned exceptional circumstance, civil servants are not barred from seeking administrative or legal relief when their constitutionally- or legally-guaranteed rights are abridged due to the relevant authority's illegal or improper administrative acts.<sup>365</sup>

*Judicial Yuan Interpretation No.187* [1984] clearly states that the Justices would no longer tolerate the unconditional application of the special power relationship in the first place, but then drew in their horns immediately, confirming a necessity for the application and providing a definition of the principle. It was 1984, and the Justices in that time period were still hesitant, wavering between conservatism and liberalism.

### **8.3.2 Public Functionaries: Two Decisive Cases in 1989 and 1992**

An administrative decision made [...] to remove a public functionary from his office [...] has a direct impact on the constitutionally

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<sup>365</sup> *Judicial Yuan Interpretation No.187 Reasoning* [1984] (Official Translation).

guaranteed right of such public functionary to hold public office. Therefore, such public functionary may, as a matter of course, exercise his right to file an administrative appeal or right to sue as provided for under Article 16 of the Constitution. Such public functionary has petitioned the competent authorities and the personnel authorities, respectively, for a review and a second review of the decision. [...] If such public functionary is not satisfied with the decisions of the aforesaid authorities, he should be allowed to institute an administrative litigation so as to bring the matter in line with the legal principle that there is a remedy where there is a right.<sup>366</sup>

According to Article 77 of the Constitution, the Judicial Yuan shall take charge of cases concerning disciplinary measures against public functionaries. Depending on the nature of the said disciplinary measures, laws may be made to allow top-ranking officials to take such measures, within reasonable scope. However, in cases concerning disciplinary measures with consequence sufficient to change the status of the public functionaries or with serious impact on such public functionaries, the person under order of disposition may file an objection with the judicial organ in charge of disciplinary measures; the said organ will then examine the original disciplinary measures to decide whether there is any contradiction with the law or any other inappropriateness, and whether legal relief shall be offered. Relevant laws shall be amended accordingly, and supplements to Interpretation No. 243 of the Judicial

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<sup>366</sup> *Judicial Yuan Interpretation No.243* [1989] (Official Translation).

Yuan shall be made.<sup>367</sup>

A combined analysis of *Judicial Yuan Interpretations No.243 [1989] and No.298 [1992]* can easily conclude that what the Judicial Yuan had done was in effect like peeling an onion – the Judicial Yuan firstly informed the executive that of all public functionaries the executive had punished shall be entitled to bring an administrative lawsuit.<sup>368</sup> Following that, in *Judicial Yuan Interpretation No.298 [1992]*, the Judicial Yuan further declared that the power to discipline public functionaries belongs constitutionally to the Judicial Yuan, thus the executive bodies' delegated power to discipline public functionaries is actually subject to the Judicial Yuan's decision.

### **8.3.3 Students: Judicial Yuan Interpretation No.382 [1995]**

The appellant of this case, Mr Wang Shi-Xian, a student of the National Taipei Junior College of Business, was accused of multiple instances of cheating in his final examinations, and was expelled from Junior College in 1991. He petitioned and re-petitioned against the Junior College's decision, but his petitions were all turned down in accordance with the special power relationship principle. Wang Shi-Xian thus appealed his case to the Administrative Court, which held that:

Article 1 of the Administrative Appeal Act (1930/79) clearly stipulates that the rights to petition and re-petition shall be exercised by the people in circumstances in which either the central or the local administration has administered the law illegally or improperly. As to the decision made

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<sup>367</sup> *Judicial Yuan Interpretation No.298 [1992]* (Official Translation).

<sup>368</sup> *Judicial Yuan Interpretation No.243 [1989]*.

by a national college for students, it falls within the ambit of special power relationship, which is different from the decision made by either the central or local administration for the people. Students shall therefore have no right to petition and re-petition against a national college accordingly. [...] Administrative lawsuits filed against the Junior College shall be [procedurally] dismissed by reason of illegality, [and the court holds that] there is no need to consider the appellant's substantive claim [in this event].<sup>369</sup>

It is obvious that the Administrative Court stood in favour of the special power relationship, deeming that Wang Shi-Xian, as a student, was both legally and morally ineligible to conduct an administrative lawsuit against his Junior College, thus the court not only stated that the appellant's substantive claim was irrelevant but also lectured Mr Wang Shi-Xian stringently:

[T]he appellant refused to accept the decision of relinquishing his claim, claiming that [the decision] was a violation of the dropping out terms of the Regulation Concerning the Enrolment of the Students of Junior Colleges. [He] should behave properly, pleading and petitioning [the College] for reconsideration according to Article 3 of the Regulation. However, the appellant did not do so but had the impudence to petition and re-petition according to the administrative legal proceedings [...]<sup>370</sup>

In contrast to the Administrative Court's conservative view, the Judicial Yuan acted like

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<sup>369</sup> *Administrative Court Decision, 81 Ruling No.923* [1992] (Author's Translation).

<sup>370</sup> *Id.* (Author's Translation).



the saviour of human rights, spreading a contemporary human rights gospel on this special and rare occasion. The Justices held that:

An expulsion or similar action taken by a school of any level against one of its students in accordance with its student codes or disciplinary regulations will change that student's status and hinder his/her opportunity to receive an education. In light of its significant impact on the people's right to education guaranteed by the Constitution, such a disciplinary action shall be classified as an administrative act subject to administrative appeal and administrative litigation. The disciplined student is entitled to bring an administrative appeal and later an administrative litigation when he/she has exhausted all remedies available within his/her school. To the extent that it is contrary to this Interpretation, the ruling announced in Precedent P.T. No. 6 of the Administrative Court in 1952 should no longer be applied, so that the right to education and the right of instituting legal proceedings guaranteed by the Constitution can be secured.<sup>371</sup>

#### **8.3.4 Soldiers and Sailors: Judicial Yuan Interpretation No.430 (1997)**

Following the release of administrative legal burdens imposed by the conventional application of the special power relationship upon public functionaries and students, soldiers and sailors became the final freedom fighters, removing the shadow that hung over human rights. Major Lin Qing-Cai was forced by the Taiwan Military Reserve

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<sup>371</sup> *Judicial Yuan Interpretation No.382* [1995] (Official Translation).

District Command to demobilise in 1994, and his petition and re-petitions were all turned down; as a result, he filed an administrative lawsuit against the command, but the case was dismissed on procedural grounds:

The right to petition and re-petition shall be exercised by the people whenever their rights or interests are infringed by an administrative organ because of any unlawful or disproportionate administration. In terms of the basis of special power relationship, there is no lawful right to petition and re-petition accordingly. The *Administrative Court Adjudication, 48 Suit No.11* [1959] is on record [...] [the decision of demobilisation] [and] was made under the special powers relationship, which is different from an *actio popularis* against an unlawful administrative decision. [This court] thus deems neither the appellant's administrative lawsuit against the defendant legal, nor the procedural dismissal of the re-petition inappropriate [...] <sup>372</sup>

Of all the special power relationship cases mentioned in this chapter, it is not difficult to see that the Administrative Court had one simple syllogistic formula for this type of case:

1. As long as the special power relationship principle applies, the appellant has no right to petition, re-petition or bring any form of administrative litigation.
2. Unfortunately, the special power relationship principle is applicable because

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<sup>372</sup> *Administrative Court Decision, 84 Ruling No.310* [1995] (Author's Translation).

of the appellant's profession.

3. Game over, and the appellant's substantive claim is no longer relevant.

Moreover, the Administrative Court was actually displaying another pattern of logic:

If the Judicial Yuan decides that A is no longer subject to the special power relationship, then A is beyond the reach; however, the application of special power relationship remains as a fundamental legal principle, unless the Judicial Yuan makes it clear that this principle shall be null and void.

Once again, the Judicial Yuan became 'an instrument for democracy and human rights' (Ginsburg, 2003: 106) in Major Lin Qing-Cai's case, holding that:

Military officers are in a broad sense civil servants and have public law relationships with the State due to their official posts. Active service military officers who file petitions for remaining on active duty according to pertinent rules and whose petitions are rejected following orders of discharge, if they question the orders, may seek remedies by lodging administrative appeals and bringing administrative proceedings following the respective due procedures since the orders of discharge affect their military statuses and may result in violation of the constitutional guarantee of the right to perform public service. The part of Supreme Administrative Court Precedent No. 11 (Pan-tze No. 11),<sup>373</sup>

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<sup>373</sup> *Administrative Court Adjudication*, 48 Suit No.11 [1959].

Supreme Administrative Court of 1959, which is in contravention to this Interpretation, shall no longer be applicable.<sup>374</sup>

The Judicial Yuan's behaviour over these special power relationship cases brings out one question:

If the Judicial Yuan prefers to determine special power relationship cases on a case-by-case basis, instead of nullifying the principle at once – is it a strategy that is attempting to encourage the general public to bring any case relevant to human rights to the Judicial Yuan?

### **8.3.5 Conclusion: *Pro Bono Publico***

The application of the principle of the special power relationship in Taiwan reflects a legal convention with a cultural origin which was held legally binding (*vinculum juris*) in administrative law for decades. It was originally a Paul Laband principle (Laband, 1876: 383-488) introduced from Germany, although the principle was strongly compatible with the moral norms of traditional Chinese bureaucracy (Shen, 2004: 19-23) and thereby it had been broadly applied within the system of ROC administrative law since 1929. Such a historical coincidence might reflect the Justices' thoughts and considerations towards mass public support.

If the Justices attempted to override a legal convention with a strongly cultural origin, there ought to be some persuasive and positive motive behind their actions, particularly

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<sup>374</sup> *Judicial Yuan Interpretation No.430* [1997] (Official Translation).

bearing in mind the political price the Justices had to pay for the changes (Ghosh, 1997: 43-62). In the event of derogating the application of the special power relationship principle, the Judicial Yuan's decisions were *de facto* a series of direct and deliberate political challenges against the executive under circumstances in which the executive was morally and historically entitled to have such prerogatives. The executive branch's strong political reaction should therefore have been expected. When the Justices made their decisions to derogate the application of the special power relationship principle, they knew they would benefit from upgrading Taiwan's human rights standards, and held that their decisions would not harm the Judicial Yuan.

The author of this thesis does not consider that people who have political liberalised from an authoritarian regime for less than 10 years can appreciate the full connotations or the spirit of human rights. There must have been plenty of occasions when the people were unaware of their own rights (Bouvard, 1996: 8). The evolution of a public sense of human rights requires an epistemic process. If people were not aware of their own rights, how could they possibly fight for them?

The principle of the special power relationship is definitely within this ambit, because it performs a perfect logic – If you are a public functionary, student, soldier or sailor of this nation, you are subject to the principle of special power relationship. This means that you have no right to complain because you have chosen your own profession and you need to pay for your decision.

There should be no doubt that the logic formula of the special power relationship principle is somehow too perfect, and that a normal person even with insufficient knowledge of human rights could easily perceive its defects; however, the infringement

of human rights whilst applying the principle is possible. If the defect is broadcast academically and authoritatively to the public, public opinion towards the principle of special power relationship will certainly change.

This means that the Justices – as the best qualified fifteen people in Taiwan, and who were surely aware of the elaboration of human rights – as well as academics and authoritative jurists of this country, would have found it comparatively easy to influence their own nationals on advanced concepts of human rights via the exercise of the judicial power. The Justices were like professors in the realm of human rights protection, and they earned their name by passing their teachings to the people.

## **8.4 JUDICIAL LIBERALISM AND ITS IMPACT ON HUMAN RIGHTS**

There are many ways to address *Judicial Yuan Interpretation No.392* [1995], a constitutional litigation referring to prosecutors' arbitrary powers of custody. This case is commonly referred to as 'the trial of the century' in Taiwan. However, this thesis has no intention of discussing the case in detail. It will relate the story in a simple manner, avoiding any accusations of political bias.

The story of *Judicial Yuan Interpretation No.392* [1995] is not complicated: the ROC, as a civil law state, employed prosecutors who followed the civil law tradition, in the same way as Judges d'instruction in France and Luxembourg, with the power to detain accused criminals arbitrarily. In the 1990s, however, many political interest groups attempted to challenge this civil law tradition, including legislators, judges, lawyers and legal academics, claiming that the tradition was a violation of human rights and appealing against the procuratorate to the Judicial Yuan. These political interest groups

deliberately stirred up the prosecutors' anger in the media, arguing for and against them publicly in order to gain public support before the Judicial Yuan's hearings were held.

#### **8.4.1 The Trial of the Century: The Prosecutors' Power to Custody**

[The reason why] the constitution represents the essential peace of the state is due to [its] deep-rooted nationalism in the realms of history, culture, politics and social background. A country's constitutionalism cannot therefore completely reverse the foundations of its history, culture, politics and social system. This is the root cause of the diversity between nations in respect of the content and ambit of their judicial and executive powers, and explains why prosecutors in the Netherlands, Zürich, Basel, Aargau, Luzern and Graubünden of Switzerland do have the power of custody [...] and why prosecutors in the United Kingdom and the United States [...] can only play the role of public accuser.<sup>375</sup>

The abovementioned partial dissenting opinion submitted by Justice Wang Ho-Hsiung in *Judicial Yuan Interpretation No.392* [1995] illuminates both the historical and theoretical dilemma of this trial:

The claim that the procuratorate should not possess the power of custody on the basis of the separation of powers doctrine may not be persuasive enough within a civil law state like the ROC. As a result, the essence of the claim is constructed under common law ideology.

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<sup>375</sup> *Judicial Yuan Interpretation No.392* [1995] (Wang Ho-Hsiung, partial dissenting) (Author's Translation).

This thesis stresses the logic pattern of this because the opinion of this thesis on this case lies outside the mainstream of current legal academic opinion in Taiwan (Li, 2008:97-112; Su, 1999: 179-200). It holds that the main bone of contention in the case was not about the distinction between the judiciary and procuratorate. If the definition of judiciary is different from one nation to another, such as Judges d'instruction in France, Spain, Belgium and Luxembourg, which have a hybrid position as both a judge and investigator, then Taiwan's debate as to whether the procuratorate should be a judicial organ or not in *Judicial Yuan Interpretation No.392* [1995] is no longer relevant. In other words, this thesis argues that the genuine bone of contention in this case is public opinion – if Taiwan's general public could no longer accept the procuratorate's power of custody, the Justices would make a strategic decision in name of human rights. In contrast the Justices might follow Taiwan's tradition of civil law, holding that the procuratorate is entitled to have such a power:

[Justice Minister] Ma Ying-Jeou was very cautious and concise in public, but [he] immediately ordered his staff to issue [public] statements in order to secure the [procuratorate's] power [of custody]. Prosecutor Liu Cheng-Wu of the Taipei Prosecutors Office came forward and challenged the leapfrog appellant, Judge Gao Shi-Da of the Taichung District Court publicly, but Gao Shi-Da declined to rise to the challenge. However, prosecutors and judges began a battle of words against each other through media, and [Taiwan's] public opinion forums came under heavy fire. The Taipei Bar Association also joined the battle, supporting



publicly that the power of custody should return to the courts.<sup>376</sup> (Chang, 1997: 46)

#### **8.4.2 Instrument of Appeal – Chairman Hsu Hsin-Liang’s Petition<sup>377</sup>**

The first instrument of appeal by Chairman Hsu Hsin-Liang of the Democratic Progressive Party was submitted on 13 October 1989, following the procedural dismissed of his petition against the procuratorate’s criminal custody decision by the Taiwan High Court. Chairman Hsu Hsin-Liang was arrested on 27 September 1989 on charges of unlawful entrance into homeland and treason. He was brought to the Taiwan High Prosecutor’s Office and was immediately taken into custody under the orders of the Prosecutors Office. Chairman Hsu Hsin-Liang petitioned the Taiwan High Court for his release on 7 October 1989, but his petition was dismissed on the same day.

A national requires permission to enter into homeland – this was how the nationalists ruled our country in the past [...] absolutely ridiculous!<sup>378</sup> (Private conversation between Chairman Hsu Hsin-Liang and his old friends attended by the author of this thesis in 2013)

His lawyer, Mr Chen Shui-Bian, who later became ROC President (2000-2008), petitioned the Judicial Yuan for his release, claiming that the prosecutors’ power of custody should be considered unconstitutional. He argued:

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<sup>376</sup> Author’s Translation.

<sup>377</sup> *Judicial Yuan Interpretation No.392 App’x* [1995] (Instrument of Appeal).

<sup>378</sup> Author’s Translation.

Personal freedom is the people's most fundamental freedom. [...] When interpreting the content of Article 8II of the Constitution, referring to the *certiorari* system, the essence is concrete and clear that a person's petition for *certiorari* shall be granted as long as [he or she] is arrested and detained on criminal suspicion, and there no further limitations are provided. However, Article 1 of the Habeas Corpus Act provides that 'when a person is arrested and detained unlawfully by any organ except the courts, he or she shall be entitled to petition either the district court or its superior high court where he or she was arrested and detained for *certiorari*'. [Thus I argue] that this additional term 'unlawful arrest and detention' is obviously unconstitutional [...]<sup>379</sup>

The so-called courts provided by Article 8 of the Constitution ought to be defined more narrowly as judicial organs that are empowered to try, thus excluding the procuratorate. This is not only a common consensus amongst academics but also something that was approved by your worships' decision in *Judicial Yuan Interpretation No.13* [1953]. [...] The procuratorate's power, according to Articles 76 and 101 of the Criminal Procedure Law, is to detain people for long periods of time without reason or charge, which undoubtedly constitutes an unconstitutionality against the provisions provided by Articles 8II and 8III of the Constitution, [thus] infringing upon people's personal freedom [...]<sup>380</sup>

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<sup>379</sup> *Judicial Yuan Interpretation No.392* App'x [1995] (Instrument of Appeal) (Author's Translation).

<sup>380</sup> *Id.* (Author's Translation).

### **8.4.3 Instrument of Appeal – the Legislative Yuan’s Proposal<sup>381</sup>**

The second instrument of appeal was politically critical because it was submitted in the name of the Legislative Yuan on the basis of the Legislative Resolution of the 32nd Conference of the 89th Session. The resolution asked for a judicial decision as to whether or not the procuratorate should be deemed a judicial organ delineated by Article 8I of the Constitution. This instrument of appeal embodied the legislature’s open political challenge against the executive. The instrument of appeal was originally promoted and co-signed by 17 congressmen/women, of which 16 (94.18%) came from the total of 21 democrats (76.19%) with the addition of 1 independent congressman (5.82%). It was therefore an undeniably democratic proposal, especially considering that the only independent signatory, congressman Cheng Ding-Nan, joined the Democratic Progressive Party the following year (1993).

The instrument of appeal claimed that the procuratorate was not capable of existing as a constitutional judicial organ because of its institutional function. The powers of investigation, indictment and execution of punishment are all active and aggressive powers, meaning that the procuratorate could only be part of the executive. However, Article 8 of the Constitution is clearly a *habeas corpus* clause, protecting people from illegal arrest, custody and trial. It was therefore completely irrational to consider the procuratorate as a constitutional judicial organ, and it should therefore be unconstitutional to allow the procuratorate such arbitrary powers of custody.

### **8.4.4 Instrument of Appeal – Enhanced Democratic Proposal<sup>382</sup>**

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<sup>381</sup> Id.

<sup>382</sup> Id.

The previous instrument of appeal, submitted in the name of the Legislative Yuan on 17 June 1992, principally challenged the constitutional identity of the procuratorate, claiming that it was not a judicial organ and that the power of custody provided by Article 8 of the Constitution had been given illegally to prosecutors. However, the Justices made no decision on this appeal until 52 congressmen/women submitted an enhanced instrument of appeal on 18 July 1995, placing more arguments to back up their 1992 claim.

This enhanced instrument of appeal was originally promoted by congressman Chang Chun-Hsiung, and co-signed by 52 congressmen/women, including 49 democrats (94.23%), 2 New Party members (3.85%) and 1 independent congressman (1.92%). Congressman Chang Chun-Hsiung was undoubtedly the force behind this proposal – he had been a cause lawyer in his early life, which rendered him more than capable of leading this constitutional litigation. He was also a law school classmate as well as a close friend of the then Chief Justice Weng Yueh-Sheng, and he was thus considered to be the right person to persuade the Chief Justice at the trial, even though none of the evidence he provided measured the emotional and subconscious influence of this friendship. Congressman Chang Chun-Hsiung wrote a memoir about the trial in 1997, placing detailed information of all the hearings of this litigation on record:

[Congressman Chang Chun-Hsiung] considered this event as an opportunity to renovate our nation's criminal procedure system, as well as the best chance of examining the newly commissioned sixth-term Justices of the Judicial Yuan in terms of their courage of guarding the

Constitution [...] <sup>383</sup> (Chang, 1997: 42)

Congressman Chang Chun-Hsiung's instrument of appeal accused the Criminal Procedure Law (1928/93) of unconstitutionality, claiming that Articles 71IV and 102III of the Law that empowered the procuratorate to detain criminal suspects without warrants of arrest was incompatible with the principle of *habeas corpus* provided by Article 8 of the Constitution. He emphasised particularly that the ROC's principle of *habeas corpus* ought to be granted by the Constitution, and its judiciary should be the only state organ that empowered to detain criminal suspects, and that the judiciary should no longer tolerate the procuratorate's abuse of power. In other words, this instrument of appeal written by congressman Chang Chun-Hsiung – who was also a well-experienced cause lawyer as well as a close friend of the then Chief Justice – was attempting to play the judiciary off against the procuratorate, stating:

My Lords, the procuratorate is taking advantages of you, the judiciary. Are you sure that there is nothing you can do?

#### **8.4.5 Instrument of Appeal – Judge Gao Shi-Da's Leapfrog Appeal<sup>384</sup>**

The final instrument of appeal was submitted by Judge Gao Shi-Da, a famed public figure in Taiwan after his direct participation in the judicial innovation movement, who decided to suspend the trial and granted the accused a writ of constitutional leapfrog appeal on 25 August 1995:

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<sup>383</sup> Author's Translation.

<sup>384</sup> *Judicial Yuan Interpretation No.392 App'x* [1995] (Instrument of Appeal) (Author's Translation).

This court [...] holds that the prosecutors' power of detaining the accused during the period of investigation provided by [...] the Criminal Procedural Law is unconstitutional, and considers that [this given power] should be incompatible with Article 8 of the Constitution and thereby constitutes 'unlawful custody' under Article 1 of the Habeas Corpus Act. [This court therefore] requests your worships' decision [...] upholding that the so-called courts provided by Article 8 of the Constitution ought to be defined more narrowly as judicial organs that are empowered to try, [and] the procuratorate should be excluded, thus nullifying Articles 102III and 121I of the Criminal Procedure Law that empower the prosecutors to detain the accused.<sup>385</sup>

Judge Gao Shi-Da's position clearly stated that he could not tolerate the prosecutors' abuse of power. He wrote:

[T]he trial court [of our nation] is commissioned constitutionally to provide immediate protection of people's personal freedom, based on the court's function for independent trial, wherein [the court] is capable of restraining others, especially the executive organs, from committing violations of human rights. [...] The prosecutors' power to prosecute; [however], has revealed their [constitutional] identity, executive agents, [and thus identity] has never been changed [...]<sup>386</sup>

If a prosecutor is also an accuser, that the power to detain the accused

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<sup>385</sup> Id. (Author's Translation).

<sup>386</sup> Id. (Author's Translation).

arbitrarily over a long period of time is [already] tantamount to the prosecutor's absolute dominance over the accused during the period of investigation. That is to say, the accused, by virtue of his or her inferior position during the period of investigation, has lost his or her lawful human rights regarding personal freedom clearly provided under Article 8 of the Constitution. [If] the so-called principle of equality of arms [Der Grundsatz der Waffengleichheit] has already been discarded during the period of investigation, the courts' insistence upon the principle during the trial stage may only become formalistic, resulting in damage to the truth [caused by the prosecutors during the period of investigation] which may never be remedied.<sup>387</sup>

#### **8.4.6 Decision**

This thesis has no doubt that the Judicial Yuan made a strategic decision in *Judicial Yuan Interpretation No.392* [1995], pacifying the procuratorate with an admission of the prosecutors' personal interests on one hand, and pleasing the mass public, courts and law society by abridging the procuratorate's power of custody on the other. Through a strategic decision which meant that the procuratorate did not completely lose and the public, courts and law society did not completely win, the Justices once again secured their reputation among the public, and avoided political revenge at the same time.

Judges shall hold office for life. No judge shall be removed from office unless he has been found guilty of a criminal offense or subjected to

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<sup>387</sup> Id. (Author's Translation).

disciplinary measure, or declared to be under interdiction. No judge shall, except in accordance with law, be suspended or transferred or have his salary reduced.<sup>388</sup>

This was what the procuratorate had been fighting for, and the Judicial Yuan was surely well aware of that – it was virtually an open secret. The prosecutors claimed themselves as Taiwan’s Judges d’instruction according to the tradition of civil law, and if the procuratorate was no longer considered as a judicial organ, the prosecutors would lose their position to claim protection under Article 81 of the Constitution. The loss of custody powers was one thing, but the loss of judicial organ status was far more deadly to the procuratorate. Therefore, the Justices concluded that:

[T]he prosecutor’s offices act on behalf of the state to investigate, indict, and punish. Since the duty and function of a prosecutor’s office is to carry out its role in criminal justice, its conduct within this sphere of state action shall be deemed “judiciary” in an expansive sense. Therefore, the term “judicial organ” used in Article 8, Paragraph 1, of the Constitution would not have the same meaning as the term “judicial organ” used in Article 77 of the Constitution. Instead, the term is applied as an expansive definition in order that the prosecutor’s offices may be included therein.<sup>389</sup>

After the interests of the prosecutors had been secured, it was time to please the mass public, the courts and the law society by depriving the procuratorate’ power to custody:

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<sup>388</sup> Constitution of R.O.C. § 81 (1947) (Official Translation).

<sup>389</sup> *Judicial Yuan Interpretation No.392* [1995] (Official Translation).



The term “trial” defined in Article 8, Paragraphs 1 and 2, of the Constitution means trial by court. He who has no authority to try a case cannot conduct this proceeding. The “court” defined in Article 8, Paragraphs 1 and 2, means a tribunal composed of a judge or a panel of judges empowered to try cases. According to Article 8, Paragraph 2, of the Constitution, if any organ other than a court arrested or detained a person, such organ shall surrender the detainee to a competent court for trial within 24 hours of said action. Therefore, the Code of Criminal Procedure, Article 101, and Article 102, Paragraph 3, applies *mutatis mutandis* to Article 71, Paragraph 4, and Article 120, which empowers a prosecutor other than a judge to detain suspects; Article 105, Paragraph 3, of the same Code which empowers a prosecutor to grant a request for detention submitted by the chief officer of the detention house; Article 121, Paragraph 1, and Article 259, Paragraph 1, of the same Code which empowers a prosecutor to withdraw, suspend, resume, continue detention, or to take any other measures in conjunction with a detention.<sup>390</sup>

These provisions are incongruous with the spirit of the aforementioned Article 8, Paragraph 2, of the Constitution. Article 8, Paragraph 2, of the Constitution merely provides: “When a person is arrested or detained on suspicion of having committed a crime, the organ making the arrest or detention shall in writing inform said person, and his designated relative

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<sup>390</sup> Id. (Official Translation).

or friend, of the grounds for his arrest or detention, and shall, within 24 hours, turn him over to a competent court for trial. Said person, or any other person, may petition the competent court that a writ be served within 24 hours on the organ making the arrest for the surrender of said person for trial.” It does not impose an “unlawful arrest or detention” condition for surrendering the detainee to court for trial. Whereas Article 1 of the Habeas Corpus Act [...] does add an extra term “unlawful arrest or detention” as a condition for petitioning the writ. Therefore, this provision violates the aforementioned Article 8, Paragraph 2, of the Constitution.<sup>391</sup>

The decision of *Judicial Yuan Interpretation No.392* [1995] shows that the Justices did not consider the Judge d’instruction system inherently wrong – it wasn’t a case of being right or wrong, it was a civil law tradition. However, the Justices were aware of the social and political atmosphere that pertained at the time, so they deprived the procuratorate’ power in exchange for the prosecutors’ personal interests – it was a wise decision of unconstitutionality:

It is hereby declared that the abovementioned unconstitutional provisions of the Code of Criminal Procedure and the Habeas Corpus Act shall lose effect within two years from the date of promulgation of this Interpretation [...] <sup>392</sup>

## 8.5 CONCLUSION

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<sup>391</sup> Id. (Official Translation).

<sup>392</sup> Id. (Official Translation).

Critics commented that the Achilles' heel of the [Judicial Yuan's] reviews over human rights in the post-martial law period is that the Justices only concern themselves about the mainstream human rights of the majority, and have a poor sense of human rights protection for the minority and the disadvantaged [...] <sup>393</sup> (Li, 2012: 346)

The above comment, cited by Nigel N.T. Li, makes a perfect conclusion on the Justices' judicial behaviour in terms of human rights cases. This thesis would therefore like to establish a logic model for the Justices' behaviour, testifying to Li's conclusion and disclosing the Justices' interaction with the mass public by using a reverse approach:

It is logical. The needs of the many outweigh the needs of the few or the one. (Star Trek: The Wrath of Khan, 1982)

If this is the logic formula that the Justices adopted, then we can conclude that the Justices' primary concern was not human rights, but the needs of the many. If this is true, the Justices may not make decisions in favour of human rights protection, and they would always please the majority even if a decision by the majority against human rights is made. If the Justices were to make a series of decisions that fell into this category, then their promotion of human rights was simply cynical and strategic:

If the Justices' primary concern was the needs of the many, the Justices would only promote human rights if this right was compatible with the needs of the

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<sup>393</sup> Author's Translation.

many.

This logic explains the Justices' attitude towards the procuratorate's power of custody in *Judicial Yuan Interpretation No.392* [1995]. The Justices overrode civil law tradition in the name of human rights; however, their overriding decision also met the needs of the many. Through the Justices' admission of the procuratorate's judicial organ status, it is more than clear that the Justices did not consider this civil law tradition wrong, but simply made a strategic decision for the needs of the many – and their own continuing support. This begs the following questions – What could the Justices get if they made decisions for the needs of the many? What political price would the Justice pay if they did not do so?

The special power relationship cases might offer researchers the best answer as to why the Justices preferred to decide in favour of the needs of the many, and why they attempted to shape public opinion in terms of the genuine needs of the many. It should not be difficult to discover that the Justices could win support amongst the public, as long as they pleased the majority by providing decisions for the needs of the many. They were therefore willing to enlighten the mass public on specific categories of human rights, which is a sort of right that everyone may enjoy, if thus illumination cemented the Justices' reputation and added to their popular support.

## 9: LIMITATIONS TO JUDICIAL POWER: SILENCE AND AVOIDANCE

### 9.1 INTRODUCTION

The king is like a boat and his subjects are the water. The water that bears the boat is the water that sinks the boat.<sup>394</sup> – Xunzi (313-238BCE)

Xunzi, one of the greatest Confucian legal philosophers, demonstrates the relationship between the ruler and the ruled in this metaphor, holding that a decision maker in China is considered legitimate only when his or her decision meets the public's favour – otherwise the boat would be sunk. It is of course an ancient concept of democracy, but it is also a stark warning to those in charge: do not anger the public.

If we read Xunzi in accordance with Baum's audience theory (Baum, 2006: 25-32), we can see the public as the prime audience of the Chinese rulers. Unlike Machiavelli, the Chinese *Il Principe* (Confucianism) preferred to lecture the rulers on the essence of public opinion, convincing the rulers that there is no better way to rule permanently than to listen to public opinion (Li, 2012: 42-45). Hence, it would be wise not to anger the public in order to avoid disaster. This applies not only to government officials but also to judges in China, and it also brings out the final 'but for' causation embodied in the methodology chapter (Chapter 3.3) – If the Justices never considered public opinion as their primary judicial audience (Baum, 2006: 25-49), they would not have to avoid angering the public strategically.

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<sup>394</sup> Author's Translation.

In this chapter two typical cases from the 1990s will be examined in which the Judicial Yuan deferred to vigorous public preference (capital punishment cases) and divided public opinion (political question cases) in order to avoid angering the public directly. If the Justices did not take public preference or public opinion into consideration (Baum, 2006: 60-72), they would be expected to behave more assertively – but in reality, they chose deference by submitting no dissenting opinions (silence) and making no concrete decisions on political questions:

[T]he judge, unexpectedly, told me in the court: ‘My dear Barrister Lin, if I show mercy on him [the accused], the public will show no mercy on me!’ The judge’s consideration was not about the conformability of [criminal] custody on the legal basis, but public opinion.<sup>395</sup> (Interview with Lin on 3-JUL-2013)

Such a phenomenon is not because of political intervention towards the judiciary, but the magnificent pressure public opinion provided, which most of the judges could not defy.<sup>396</sup> (ibid)

## **9.2 WHILST PUBLIC OPINION BIASES**

If there is no applicable act for a civil case, the case shall be decided according to customs. If there is no such custom, the case shall be

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<sup>395</sup> Author’s Translation.

<sup>396</sup> Author’s Translation.

decided according to the jurisprudence.<sup>397</sup>

Only those customs which are not against public policy or morals shall be applied to a civil case.<sup>398</sup>

Articles 1 and 2 of the ROC Civil Code are empirical doctrines embodied according to the Roman law principle of *consuetudo pro lege servatur*, by which morality is recognised as the source of law (La Torre, 2007: 12-15). In fact it is not only the ROC that recognises moral principles as its common law, it is an ancient legal custom dating back to the Roman era. In 1945 to 1946, moral principles were even used to rebut the Nuremberg defence of ‘I was just following orders’ (Citron, 2006: 139-150), thus founding Principle IV of the Nuremberg Principles:

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.<sup>399</sup>

If moral principles can be applied to prevent war crimes, then it should come as no surprise that moral principles should also be applied to provide the legitimacy for capital punishment – as long as the execution is held justifiable within society. In other words, through the observation of a judge’s decision in which moral principles are a prominent concern, especially if this judge’s personal belief is against these moral principles, the influence of the public opinion towards the judge should be evaluated,

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<sup>397</sup> Civil Code of R.O.C. § 1 (1929) (Official Translation).

<sup>398</sup> Civil Code of R.O.C. § 2 (1929) (Official Translation).

<sup>399</sup> Nuremberg Principles § 4 (1950).

because public opinion would be extremely sensitive in terms of what the judge decides about moral and social justice.

### **9.2.1 An Eye for an Eye Legal Tradition: *Lex Talionis***

[I think that Minister of Justice] Wang Ching-Feng is noble-minded; however, a good judge is obliged to do the right thing and [he or she] will not go to hell for sentencing the accused to death.<sup>400</sup> (Pai Ping-Ping: ETTV 12 March 2010)

Pai said that the death penalty deters violent crime and is humane enough, unlike the way in which murderers take other people's lives. She urged voters to boycott those in favor of abolishing capital punishment. (Brainstorm Digital Communications: Fun Day Trend 15 March 2010)

Pai Ping-Ping, a famous television hostess in Taiwan and a grief-stricken mother whose 17-year-old daughter was abducted, raped and murdered in 1997, believes that capital punishment is morally just in Taiwan, as a result of the *lex talionis* (an eye for an eye) tradition that is deeply rooted in the Chinese society. In Taiwan, Pai Ping-Ping even attempted to raise political pressure against legislators who supported Taiwan's abolition of capital punishment, so there is no reason to conclude that the judiciary was not under pressure.

It is commonly acknowledged in Taiwan that public opinion is in favour of capital

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<sup>400</sup> Author's Translation.



punishment. According to the BBC News, surveys show that more than 70% of Taiwan's citizens want to keep the death penalty (Cindy Sui: BBC News 4 June 2012), and this preference has brought many political crises to the government's door when executions were suspended between 2006 and 2009 (ibid). Joe Chien-Chao Hung wrote a newspaper article under the heading 'Taiwan Needs More Time to Abolish the Death Penalty' on 24 March 2010, commenting on the Justice Minister Wang Ching-Feng's resignation after a historical analysis of Chinese moral justice over capital punishment, in which he said:

All we need is time. [...] If we want to change our people's mind-set dictated by the founder of the Western Han Dynasty who ruled China from 206 to 194 B.C [...] Liu Bang simplified [...] to three basic laws when he [...] found the Han Dynasty. One of the three laws was: Death to those who killed. The Chinese have since been convinced that a murderer has to pay for his crime with death. That is why seven out of every ten people in Taiwan continue to insist that murder be punishable by death. (Joe Chien-Chao Hung: China Post 24 March 2010)

### **9.2.2 Statistics**

The Ministry of Justice promulgated a series of surveys about public opinion towards capital punishment between 1993 and 2008, and the Central News Agency reported on 1 February 2010 that more than 70% of the population in Taiwan strongly favoured the death penalty, even though there were more and more supporters who accepted conditional abolishment year after year, replacing capital punishment with life imprisonment:

When asking about [the policy] of direct abolition of capital punishment in Taiwan, according to data [the Ministry has provided] in the past 15 years, there has always been at least 70% [and sometimes more than 80%] of respondents who opposed abolition. The highest opposition rate came from a 1993 survey in which 88.3% of interviewees opposed abolition, and even in 2008 the opposition rate was still 80.0%.<sup>401</sup> (An Chih-Hsien: Central News Agency 01 February 2010)

In a report published by the Liberty Times on 14 November 2012, the Ministry of Justice's survey from 2012 reports the same demands by the public:

The public opinion poll referring to the death penalty issue investigated by [...] the Ministry of Justice [...] [shows that] 76.7% of citizens in Taiwan disapprove of the abolition of capital punishment, whilst 85.2% [of the citizens] hold that the abolition of capital punishment would have a negative effect on public safety. [The poll] indicates that the majority of the population still affirm the necessity of capital punishment and do not want it to be completely abolished [...] <sup>402</sup> (Hsiang Cheng-Chen: Liberty Times 14 November 2012)

On 08/09 April 2010, Taiwan's privately owned TVBS Poll Centre conducted one of the most detailed public opinion surveys regarding the death penalty on record (TVBS Poll Center: 09 April 2010). It concludes that:

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<sup>401</sup> Author's Translation.

<sup>402</sup> Author's Translation.

1. 85% of the population disapprove of abolishing capital punishment. Only 9% approve whilst 6% have no preference. In terms of those who have been sentenced to death, 87% of the population uphold their execution, whilst only 3% disagree and 10% have no opinion.
2. 58% of the population disapprove of life imprisonment as a substitute for capital punishment. Only 34% approve, and 8% stated no opinion. Even if the criminal has repented, 62% of the population still think that the execution should go ahead. 30% disagree and 8% stated no preference.
3. 85% of the population consider that the threat of execution will reduce serious crime. 10% reject the idea, whilst 5% have no opinion.
4. 84% of the population disagree that the execution constitutes a violation of human rights. Only 10% agree whilst 6% have no opinion. However, only 30% of the population consider the abolition of the death penalty to be unjust. 61% consider that abolishment is not unjust, whilst 8% have no preference.

### **9.2.3 Capital Punishment: Constitutionality**

After the ROC ratified and implemented the ICESCR and ICCPR, [another] application of constitutional judicial review regarding the Article 271 of the Criminal Code – a constitutionality debate about the execution of murderers – was directly dismissed by the Justices of the Judicial Yuan under procedural rules. The reason given was ‘[this sort of

case] was already reviewed’, because the abolishment of capital punishment was completely politically incorrect. I believe that this reason is extremely ridiculous: Can the constitutionality of executing drug traffickers be held equivalent to the constitutionality of executing murderers? [...] The logic is ridiculous [...] and only goes to show that the Justices of the Judicial Yuan did not want to touch this hot potato.<sup>403</sup>

(Interview with Li on 17-JUN-2013)

Li did not criticise the Judicial Yuan as severely as he might have done, because Taiwan’s case-coding shows that the court had become ‘impatient’ (Lo Bing-Cheng: WSHR 2010) with capital punishment cases. Since the fourth term (1976-1985), the Justices of each term had declared once that capital punishment would be held constitutional, and after the retirement of the sixth-term Justices in 2003, the succeeding Justices chose not to reply this sensitive subject positively through procedural dismissals in 2006<sup>404</sup> and 2010.<sup>405</sup>

The *Judicial Yuan Interpretation No.194* [1985] was the first case referring to the constitutionality of capital punishment in Taiwan’s history, and its decision was promulgated on 22 March 1985 – 6 months and 10 days before the retirement of the fourth-term Justices (01 October 1985). Through this case, the fourth-term Justices affirmed that the death sentence for drug traffickers during the martial law period would be held constitutional by the Judicial Yuan, which also implies that the forth-term Justices would tolerate any form of death penalty.

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<sup>403</sup> Author’s Translation.

<sup>404</sup> *Judicial Yuan Dismissal Resolution No.1297* [2006].

<sup>405</sup> *Judicial Yuan Dismissal Resolution No.1358* [2010].

The more open-minded fifth-term Justices then promulgated the *Judicial Yuan Interpretation No.263* [1990] on 19 July 1990, affirming once again that, so far as the Justices were concerned, Taiwan's mandatory death penalty would still be considered constitutional. This decision came only 28 days after the legendary case of congress dissolution<sup>406</sup> – it is interesting to realise that the Judicial Yuan democratised Taiwan on one hand, but confirmed the constitutionality of capital punishment on the other.

The final decision was made by the sixth-term Justices, in *Judicial Yuan Interpretation No.476* [1999] and the value of this case is that it was decided during the Judicial Yuan's golden age. Only 13 months and 24 days later, the Judicial Yuan surprised the world by successfully striking down unconstitutional constitutional amendments in *Judicial Yuan Interpretation No.499* [1999].

Chong De-Shu, a prisoner awaiting execution on death row who appealed against his death sentence to the Judicial Yuan three times before his execution, with the assistance of the Taiwan Alliance to End the Death Penalty, was informed by the Justices that his application was procedurally dismissed according to the *Judicial Yuan Dismissal Resolution No.1297* [2006] on 29 December 2006:

Whilst reviewing the appellant's request regarding the constitutionality of capital punishment as a statutory penalty, there is no necessity to make further decision, because the *Judicial Yuan Interpretations No.194* [1985], *No.263* [1990] and *No.476* [1999] have set the precedents [for

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<sup>406</sup> *Judicial Yuan Interpretation No.261* [1990].

future cases of a similar nature].<sup>407</sup>

The last tries two applications (in 2010) were based upon the ROC's ratification and implementation of the ICESCR and ICCPR in 2009, claiming that the execution of the treaties had become the ROC's international legal duty. In accordance with these two treaties, capital punishment should be abolished. However, the Justices once again dismissed the two applications procedurally on the *Judicial Yuan Dismissal Resolution No.1358* [2010] on 28 May 2010, holding that no obligation was found for abolishing capital punishment upon the ROC.<sup>408</sup>

Attorney-at-law Lo Bing-Cheng, the Director-General of the Hsinchu Bar Association, made a speech entitled 'Death's Advocates: Taiwan's Reticent Grand Justices' at the 2010 World Summit on Human Rights for World Citizens, claiming that the Justices' reticence and conservatism were due to public opinion. Lo even placed a subtitle 'The Unspoken Secret: Public Opinion Trumps All' (Lo Bing-Cheng: WSHR 2010) describing the Justices' judicial behaviour:

Our society's attitude toward abolishing the death penalty resembles this scenario, with Truth presumed to be on the side of the majority. The silent masses support the death penalty regime, so Truth stands with it. Confronted with the cries of the minority, the majority simply plays deaf, rarely offering even "the shadow of an argument." This perspective may shed some light on the stance of the Council of Grand Justices, which has quietly and consistently sided with the death penalty. [...] By the

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<sup>407</sup> *Judicial Yuan Dismissal Resolution No.1297* [2006] (Author's Translation).

<sup>408</sup> *Judicial Yuan Dismissal Resolution No.1358* [2010].

time of J.Y. Interpretation No.476 in 1999, the grand justices had begun to show impatience with petitions challenging the death penalty. [...] It was the third strike for death penalty opponents, and in the long decade since, the grand justices have shut the door on this issue. They've said what needed to be said and will devote no more breath to the matter. (ibid)

The “state of society” refers to public support for death penalty. Declaring it unconstitutional would “contradict the expectations of the country’s people” and would not be “consistent with the people’s faith in the law.” The subtext of what the grand justices are telling opponents of the death penalty is: Stop looking to us – what we think isn’t the issue. The issue is that the majority of people don’t want to get rid of the death penalty. If the majority changes its stance on day, we’ll go with the tide and declare it unconstitutional. (ibid.)

#### **9.2.4 Setting the Tune: Judicial Yuan Interpretation No.476 [1999]**

This court doubts whether such extreme legislation is beyond the arbitrary power [Gestaltungsfreiheit] of the legislature and constitutes a violation of the principle of the consistency between the crime and the punishment? If this court penalises by law, then the accused could only be sentenced either to death or life imprisonment, which [this court] holds to be over-punishing. Therefore, [this court deems that] the mentioned acts of congress that can be applied to [the accused] may be unconstitutional and [this court] conducts a leapfrog appeal by this

reason.<sup>409</sup>

District Court Judge Chen Chih-Hsiang, S.J.D. is considered either famous or notorious for his leniency and humanity towards criminals in Taiwan, conducting a constitutional leapfrog appeal for the accused by using his *ex officio* authority. His appeal eventually resulted in the Justices' ultimate resolution regarding the capital punishment debate in *Judicial Yuan Interpretation No.476* [1999]. Judge Chen Chih-Hsiang has played an active role in Taiwan's constitutional judicial review because of his personal beliefs, and he is still the champion judge who has authorised and conducted the most constitutional leapfrog appeals in history. He even said:

[A citizen] is a host of [this] nation, and we should cure him when he is ill; [however, we chose] not to cure him but sentence him to death, this is the most typically evil law of the Republic of China.<sup>410</sup> (Chen Chih-Hsiang: Business Weekly 10 December 2003)

However, Judge Chen Chih-Hsiang, a fighter for human rights who obtained his doctoral degree (S.J.D.) in the realm of human rights law,<sup>411</sup> did not persuade the Justices to abolish Taiwan's capital punishment:

[T]o execute criminal sanctions, some special criminal laws enacted for certain crimes do not violate the principle of proportionality if they have the due purposes, necessary means, and proper restrictions required by

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<sup>409</sup> *Judicial Yuan Interpretation No.476* App'x [1999] (Judge Chen Chih-Hsiang's Instrument of Leapfrog Appeal) (Author's Translation).

<sup>410</sup> Author's Translation.

<sup>411</sup> Cheng, Chih-Hsiang, *A Study on the Principle of the Consistency between the Crime and Penalty under International Human Rights Law* (S.J.D. Dissertation, National Taiwan Ocean University 2013).



Article 23 of the Constitution. They will not be deemed inconsistent with the regulations set forth in the general criminal laws and thus be held unconstitutional merely because they may infringe upon people's lives and physical freedom.<sup>412</sup>

Whilst interpreting the meaning of the Justices' decision from its context, it is likely that the sixth-term Justices were running out of patience, lecturing Judge Chen Chih-Hsiang about human rights, informing him that his appealing strategy of persuasion under the name of human rights was only based upon his personal beliefs about human rights. The Justices upheld capital punishment as being compatible with human rights as long as the principle of proportionality was always considered. The Justices did not consider the death penalty as an absolute breach of human rights, and held:

In view of national history, culture, and current social conditions, these special criminal laws should not be deemed improper if their purposes aim to conform to the nationals' expectations and the affection of the laws. In addition, these [...] laws should be deemed consistent with the principle of proportionality (*Verhältnismäßigkeitsprinzip*) under Article 23 of the Constitution if the methods used to achieve such purposes are necessary to correct and prevent mistakes and are also reasonable actions to take even though they restrict the people's fundamental rights.<sup>413</sup>

### **9.2.5 Where was Justice Su Jyun-Hsiung?**

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<sup>412</sup> *Judicial Yuan Interpretation No.476* [1999] (Official Translation).

<sup>413</sup> *Judicial Yuan Interpretation No.476 Reasoning* [1999] (Official Translation).

[T]he Justice who has written more than 20 pages in his [law] textbook, discussing the abolition of capital punishment, [eventually] submitted neither a dissenting nor a partially-concurring opinion [in *Judicial Yuan Interpretation No.476* [1999] – the court’s] conservatism over human rights [protection] was undeniable.<sup>414</sup> (Li, 2012: 341)

The Justice that Nigel N.T. Li refers to here is Justice Su Jyun-Hsiung, a well-known promoter of the abolition of capital punishment and a respectable proponent of human rights in Taiwan. It was surprising that Justice Su Jyun-Hsiung chose to keep silence on such an important case, submitting no opinion towards capital punishment; however, before his death, Justice Su Jyun-Hsiung left two profound and unusual clues behind:

1. One year after the decision of the *Judicial Yuan Interpretation No.476* [1999], Justice Su Jyun-Hsiung published his new law textbook titled ‘Introduction to Criminal Law III’ (2000), whereon he wrote 21 pages about the abolishment of capital punishment (Su, 2000: 178-198).
2. Justice Su Jyun-Hsiung was interviewed by the Judicial Yuan in November 2009, and mentioned many details about judicial decision-making progress within crucial political controversies; however, he maintained silence over the decision of the *Judicial Yuan Interpretation No.476* [1999] (Judicial Yuan, 2011: 97-202) – if he was willing to disclose so many details, why he said nothing about capital punishment?

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<sup>414</sup> Author’s Translation.

A reasonable speculation is that he was convinced by his colleagues that it was not the right time to abolish capital punishment because of public opinion; otherwise it was hard to believe that he would have kept his silence upon this case. Nigel Li also agrees with this speculation, saying:

Justice Su Jyun-Hsiung's usual opinion about the abolition of capital punishment was widely known in this country; however, there was a chance that he might change his academic opinion as he dealt with actual cases. Or there was another possibility, that Justice Su Jyun-Hsiung maintained his academic opinion but did not think our society was ready for an era without capital punishment. Of course, I agree that Justice Su should submit an opinion, making a description of his position clear within the *Judicial Yuan Interpretation No.476* [1999]; unfortunately, he did not submit any opinion.<sup>415</sup> (Interview with Li on 17-JUN-2013)

If you try to conclude that in *Judicial Yuan Interpretation No.476* [1999], public opinion [in Taiwan] showed full and clear preferences, then the Justices who always held a different academic opinion from their public opinion [had no option but] chose to keep silent; I would not oppose your conclusion [at all]. On the contrary, I would remind you in addition that *Judicial Yuan Interpretation No.476* [1999] was definitely not the only case in our nation's history – there are abundant examples referring to the Justices' reticence because the case consisted of sensitive political

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<sup>415</sup> Author's Translation.

issues on which public opinion had already stated a preference [...] <sup>416</sup>  
(ibid)

We probably will never know the genuine reason why Justice Su Jyun-Hsiung stayed silent in *Judicial Yuan Interpretation No.476* [1999]; however, it is obvious that public opinion played a crucial role in this case, and it is also reasonable to conclude that the Justices would put themselves in political danger if they decided assertively – probably this is the reason why Justice Su Jyun-Hsiung submitted no dissenting opinion; it would change nothing but only to anger the public:

I am aware that this question you have asked is [mainly] aimed at Justice Su Jyun-Hsiung. If you want to ask me as to whether Justice Su Jyun-Hsiung disobeyed his academic conscience in *Judicial Yuan Interpretation No.476* [1999], I make no comment because Justice Su Jyun-Hsiung was my professor – unless there is evidence that ‘beyond the reasonable doubt’. As his junior generation we should be more conservative [and respectful whilst talking about him]. <sup>417</sup> (ibid)

### **9.2.6 Conclusion: Public Opinion Obviously Prevails**

To be honest, I have never heard that ‘no money’ can constitute a reason of ‘debt repudiation’. Though the population of Taiwan only amounts to 1% of the population of China, [the Republic of China] is obliged to discharge [its pre-1949 debt] according to [this] percentage, right? Even

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<sup>416</sup> Author’s Translation.

<sup>417</sup> Author’s Translation.

if [the Republic of China] enters a counterplea of destitution in accordance with Article 318 of the Civil Code (1929/1999), the debt still has to be paid off. However, the result of what we have seen in *Judicial Yuan Interpretation No.475* [1999] is that no [dissenting] opinion was submitted – it was likely that all the Justices upheld that the debt repudiation claimed by the Government of the Republic of China was justifiable. The genuine reason [that caused the Justices to make such a decision] was that it would be seriously politically incorrect if [they] decided [that the Republic of China was obliged to] repudiate [its pre-1949] debt and the Justices of the Judicial Yuan would definitely receive a huge amount of public censure from the public.<sup>418</sup> (Interview with Li on 17-JUN-2013)

Nigel N.T. Li produced another vivid instance in his interview, citing *Judicial Yuan Interpretation No.475* [1999] in regard to the ROC's national debt before China's disunion in 1949, explaining the significant influence of public opinion over the Judicial Yuan and its clear bias. As in the capital punishment cases, judicial deference was a reasonable strategic decision here as well.

Even though the precise connotations of public opinion are still unsolved, public opinion polls have demonstrated that it is already beyond reasonable doubt that the Justices would receive this abstract but direct public censure if they made 'incorrect' political decisions. Judicial deference in Taiwan has indicated that the Judicial Yuan aimed to avoid angering the public strategically, and this shows how vitally important

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<sup>418</sup> Author's Translation.

public opinion had become in accordance with Baum's judicial audience theory (Baum, 2006: 25-49).

### **9.3 WHILST PUBLIC OPINION DIVIDES**

[I]f public opinion is divided on a moral issue, courts should leave its resolution to the political process. (Posner, 1999: 142)

Posner's opinion in the event of public opinion being divided implies a strategy of judicial decision-making. If judges cannot earn their reputation from judicial assertiveness, but may be harmed by decision-making, why not make a decision of no decision, to apply political question doctrines and leave the resolution to politics?

Here is a typical example provided in 1993: *Judicial Yuan Interpretation No.328* [1993] – the territorial delimitation case over a divided China.

#### **9.3.1 Taiwan: the Chinese Alsace-Lorraine**

Though the Chinese people always claim that the island of Formosa ought to be considered as China's 'existing national boundary'<sup>419</sup> or 'part of the sacred territory',<sup>420</sup> the historical fact is that the Chinese conquered the island by defeating the Dutch in 1662:

Castle Zeelandia, with its outworks, artillery, remaining war material,

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<sup>419</sup> Constitution of R.O.C. § 4 (1947).

<sup>420</sup> Constitution of P.R.C. pmb. (1982).

merchandise, money, and other properties belonging to the Honourable Company, to be surrendered to Lord Koxinga.<sup>421</sup>

Lord Koxinga, Prince of Yanping of the Ming Chinese Empire (Han-Chinese), took over Taiwan because the Ming Empire (1368-1683) was collapsing upon the Chinese mainland as a result of the Manchurian invasion and the foundation of the Qing Empire (1616-1912). The Imperial Ming Army and Navy required Taiwan as a new base for the Empire's restoration (Hong, 2009: 59-92), but neither the Dutch nor the Chinese were native the island – they were both its conquerors.

The island fell to the Qing Empire in 1683 (Shepherd, 2007: 107-132) and the new conqueror, Admiral Shi Lang, reported officially to his emperor after the conquest of Taiwan, describing the island as a 'barbarian region which had never been ruled by China' but which was 'being sincerely recommended to be reigned over for the good of China'.<sup>422</sup> History tells us that China's attitude towards Taiwan was unlike modern Chinese regimes – either the ROC or the PRC – always claimed, and history tells the inhabitants of Taiwan that China did not treat the island as part of its scared territory in 1895, despite that many records that show that China was forced to make such a decision (Li and Li, 2008: 186-189):

China cedes to Japan in perpetuity and full sovereignty the following territories, together with all fortifications, arsenals, and public property thereon [...] (b) The island of Formosa, together with all islands appertaining or belonging to the said island of Formosa. (c) The

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<sup>421</sup> Treaty between Koxinga and the Dutch Government § 2 (1662).

<sup>422</sup> Author's Translation.

Pescadores Group [...] <sup>423</sup>

When the ROC was founded in 1911, Taiwan was not included because the island was part of the Japanese Empire at the time. The restoration of Taiwan to the ROC was initially demanded by the Chinese nationalist politician Chiang Kai-Shek, a demand that was unilaterally accepted by the Allied Powers without consulting the inhabitants of Taiwan about their future:

The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion. It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent. <sup>424</sup>

The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine. <sup>425</sup>

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<sup>423</sup> Treaty of Shimonoseki § 2 (1895).

<sup>424</sup> Cairo Declaration (1943).

<sup>425</sup> Potsdam Declaration § 8 (1945).



On 25 October 1945, the island of Formosa was officially and legally delivered to the ROC (Chiu, 1979: 166). However, in 1949, only 4 years after the island's restoration, Taiwan became the last outpost (99% of actual control territory) of the ROC at the end of the Chinese Civil War (Lynch, 2010: 7-92). Councillor Guo Guo-Ji once joked about the interrelationship between the ROC and Taiwan by saying:

When the Japanese were defeated, Taiwan was returned to the arms of [our] fatherland; [however], when the Chinese mainland was taken over, [our] fatherland wanted to be held in the arms of Taiwan.<sup>426</sup> (Chen, 2005a: 190)

### **9.3.2 Complicated Emotion towards China and Reunification**

In 1936, [Taiwanese squire] Lim Hian-Tong visited Shanghai and claimed [that he had] returned to the fatherland; after [he] went back to Taiwan, he was slapped in the face by a Japanese [named] Urima Zenbee at the Taichung Park's garden party. This was the 'Incident of the Fatherland' that created quite a stir.<sup>427</sup> (Lee, 2009a: 204)

As a Japanese colony, it appears normal that the authorities would not treat Taiwan's local inhabitants equally; hence, it is reasonable to assume that the Taiwanese would expect to be liberated from the Japanese Empire in 1945:

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<sup>426</sup> Author's Translation.

<sup>427</sup> Author's Translation.

At this moment we deeply in great debt and our tears flow involuntarily, [because I] never anticipated during my lifetime that Taiwan could be restored [to China] and we can [once again] be Chinese.<sup>428</sup> (Chen, 2005a: 41-42)

Except for a few natives, the inhabitants of Taiwan are Han-Chinese. Hence, most of the people in Taiwan welcomed the restoration of Taiwan in 1945. However, the Taiwanese certainly underestimated the cultural gap caused by a 51-year division between the Han-Chinese in the mainland (Mainlanders) and those of Taiwan (Taiwanese):

[I]t would not take long for the Taiwanese to discover that the Nationalist Party behaved no differently than the Communist Party at all, and it was nearly impossible to conclude which one was more evil than the other.<sup>429</sup> (Interview with Wu on 31-MAY-2013)

President Wu Jan-Fu of the Asia Pacific Academic Exchange Foundation is one of the living eyewitnesses of the nationalist regime since Taiwan restoration. His grand-uncle was executed by the nationalists during the 2/28 Massacre in 1947; however, his uncle, Wu Po-Hsiung, served as Chairman of the Nationalist Party afterwards (2007-2009). He has devoted his whole life to Taiwan's democratisation, and he was one of the original members who founded the Democratic Progressive Party (ibid). His comment about the reunification was:

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<sup>428</sup> Author's Translation.

<sup>429</sup> Author's Translation.

At the moment, being a senior Taiwan independentist, my greatest expectation is that the ideas of liberty and democracy could take root in the Chinese mainland. As long as they accept these [two] concepts, it is hard to tell whether the People's Republic of China will be merged into the Republic of China, or whether the People's Republic of China will unite the Republic of China.<sup>430</sup> (ibid)

Chairman Shih Ming-Te (Nori) of the Democratic Progressive Party is another famous anti-nationalist, and his interpretation of the relationship between the ROC and the PRC was:

The Republic of China was founded on the Chinese mainland in 1912; [however, its rule on the mainland] was terminated due to the Chinese Civil War in 1949 and the Government of the Republic of China was withdrawn to Taiwan. The Government of the People's Republic of China was formed in Beijing, China, at the same year, thus [the Republic of China] was formally divided into two nations. For the past 60 years, the Republic of China and the People's Republic of China co-existed [...] but [they] never belonged to each other any more.<sup>431</sup> (Shih, 2011: 16)

Both President Wu Jan-Fu and Chairman Shih Ming-Te (Nori) belong to the 'minor' ROC (Klein-ROC, Taiwan only) upholders, namely that they deny any interrelationship between the ROC and the PRC and hold that Taiwan is an independent country named

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<sup>430</sup> Author's Translation.

<sup>431</sup> Author's Translation.

the Republic of China. The only difference is that Wu would conditionally accept a ‘Great’ ROC (Groß-ROC, including Taiwan, mainland China and Mongolia) if such a thing were to happen (Interview with Wu on 31-MAY-2013), but Shih clearly stated that he only wanted a ‘Minor’ ROC because this is a matter of reality (Shih, 2011:109). Besides Wu (Klein-ROC in principle, accepts Groß-ROC conditionally) and Shih (Klein-ROC only), there are other opinions towards China and reunification:

Taiwan is not a part of another country, it is not another country’s local government or province, Taiwan is not going to be the second Hong Kong or Macao, because Taiwan is a sovereign state. Briefly speaking, it shall be made clear that that Taiwan and China that from the other coast [of the Taiwan straits] are two countries.<sup>432</sup> (President Chen Shui-Bian’s Conference on 2 August 2002)

[W]e have made [our political statement] very clear, insofar as we have interpreted the term ‘one China’ as the Republic of China. This position is non-negotiable, and we would negotiate [with Beijing] only under this position. If they cannot accept [our political position, then], very simply, we will not negotiate. In other words, if I became the President, or more precisely if I were the President of the Republic of China, [I] would make this position very straight, and would never ever disgrace our Republic of China. This is our Taiwan and we are the Taiwanese people.<sup>433</sup> (President Ma Ying-Jeou’s Statement on 24 February 2008)

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<sup>432</sup> Author’s Translation.

<sup>433</sup> Author’s Translation.

President Chen Shui-Bian's political position is unstable and confusing, because his opinion towards China and reunification is completely polarised. He is either an unconditional reunification upholder who can accept being absorbed into the PRC, or a fierce independent who upholds the 'Republic of Taiwan' at all costs (Chen, 2009: 220-244). However, his polarised position reflects the fact that some Taiwanese support either China's unconditional reunification or Taiwan's absolute independence under the name of the Republic of Taiwan. He said:

[M]y main point is to emphasise that if [the People's Republic of] China wants unification, [China] should consider Taiwan's independence first. If there is no division, there would be no unification; if there is no independence, how can the final unification happen?<sup>434</sup> (ibid: 224)

In contrast, President Ma Ying-Jeou's political position is very clear, and represents the nationalist sense of conservatism that there is but only one China, the ROC – a 'Great' ROC (Groß-ROC) proposal.

### **9.3.3 Statistical Insights**

How to delimit the national territory is a purely political question. It may also be called by some scholars an act of state. This question is not subject to judicial review according to the constitutional principle of separation of powers.<sup>435</sup>

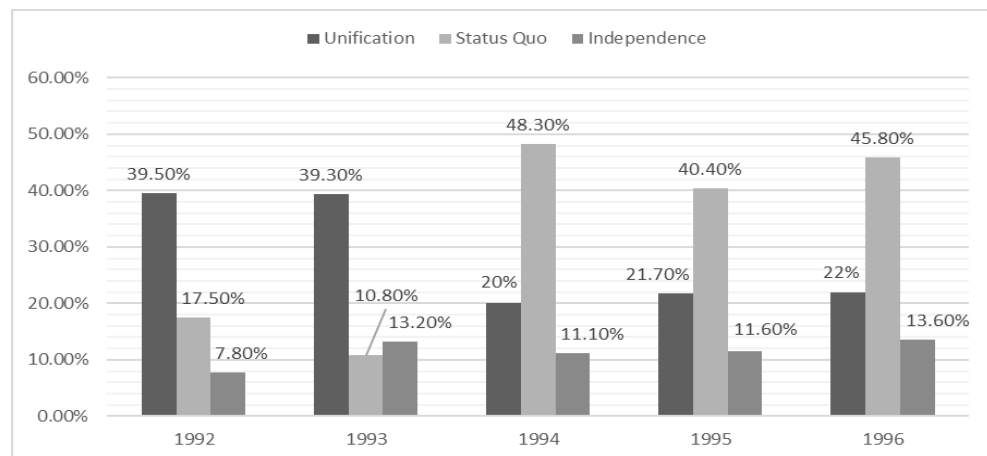
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<sup>434</sup> Author's Translation.

<sup>435</sup> *Judicial Yuan Interpretation No.328 Reasoning* [1993] (Official Translation).

The reason why the Judicial Yuan refused to step in a territorial question is due to the diverse and incompatible perspectives of national identity in Taiwan. The Taiwanese national identity can be read very differently in light of various political tendencies, and each idea of identity has respectively defined an interrelationship between the ROC and the PRC (Fell, 2012: 133-150). This means that a territorial question equals a national identity question, and the Judicial Yuan would anger atleast some of the public who stood for an opposite national identity as long as the answer was concrete.

### 9.1 Public Opinion on Unification vs. Independence, 1992-1996

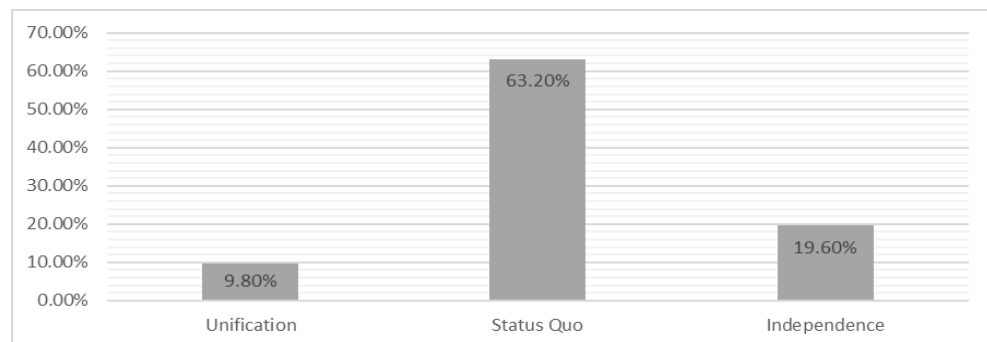


(Source: Election Study Centre, National Chengchi University)

Figure 9.1 shows changes in Taiwan's public opinion on the issue of unification versus independence from 1992 to 1996. The independent Taiwan supports were 7.8% of total population in 1992, 13.2% in 1993, 11.1% in 1994, 11.6% in 1995, and 13.6% in 1996. In the meantime, the Chinese unification supporters were 39.5% of the total population in 1992, 39.3% in 1993; and then the figures dropped dramatically (1994: 20%; 1995: 21.7%; 1996: 22%). This survey shows that public opinion was turning against the idea of Chinese reunification: they would rather choose to maintain the *status quo* (1992: 17.5%; 1993: 10.8%; 1994: 48.3%; 1995: 40.4%; 1996: 45.8%) instead of unifying. On

average, 11.46% of Taiwan’s total population supported Taiwan’s independence from 1992 to 1996, 28.56% supported Chinese unification, and 32.56% chose to maintain the *status quo*. The 2012 survey further demonstrates that the *status quo* option is favoured by the majority population in Taiwan:

## 9.2 Public Opinion on Unification vs. Independence, June 2012



(Source: Election Study Centre, National Chengchi University)

The Taiwanese public opinion survey on the issue of unification versus independence from 1992 to 1996 was not very helpful in terms of judicial decision-making in *Judicial Yuan Interpretation No.328* [1993] because there is no ‘but for’ causation (cause-in-fact) between national identity options and territorial delimitation options. For example, supporters who stand for the *status quo* consist of those nationals who prefer a ‘Great’ ROC (Groß-ROC, including Taiwan, mainland China, and Mongolia), as well as those who simply wants a ‘Minor’ ROC (Klein-ROC, Taiwan only). In other words, the Justices must need to examine public opinion through a more detailed unification versus independence survey, such as Figure 9.3 below:

## 9.3 Public Opinion on Unification vs. Independence, 1994

<i>Preference</i>	<i>Ratio</i>
<i>Unconditional Unification</i>	4.4%

<i>Preferred Unification</i>	15.6%
<i>Status Quo, Decide Later</i>	38.5%
<i>Patriots – Unconditionally the Republic of China</i>	9.8%
<i>Preferred Independence</i>	8%
<i>Unconditional Independence</i>	3.1%

(Source: Election Study Centre, National Chengchi University)

Of those who championed Chinese unification in 1994, their championship can be categorised into two types. Unconditional unification champions refer to those who care only about Chinese unification – even the unification leads into the destruction of the ROC. Conversely, preferred unification champions support Chinese unification conditionally – although they prefer the Chinese unification, the unification process must be carried out in the name of ROC. Hence, both types of unification champions would favour the Great ROC proposal on territorial controversies.

Those who adhered to Taiwan's independence in 1994 can also be categorised into two types. The adherents of unconditional independence were those who wanted to establish the Republic of Taiwan – they disliked both the Great-ROC or the Minor-ROC proposals on territorial controversies simply because of their hostility to the PRC. Meanwhile, adherents who preferred independence supported only the 'Minor' ROC proposal – for them, the ROC is Taiwan and they would not accept any further territories.

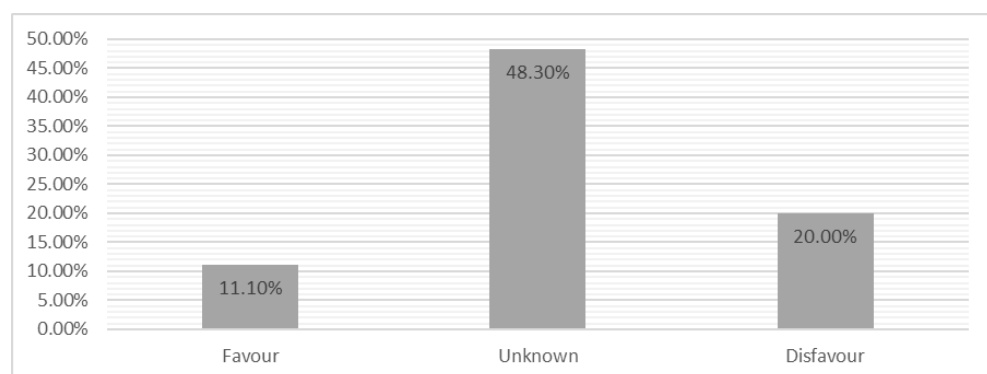
For those who wished to maintain the *status quo* in 1994, their political opinion regarding the limits of the ROC national territory was actually unknown. The unconditional ROC supporters claimed only that they were fervent patriots of the ROC – without expressing a preference for a 'Great' or a 'Minor' ROC. Moreover, the political opinion of upholders who preferred the temporary *status quo* and wished to



make a decision at a later time is definitely unknown, because they have not made any decision yet.

If the Justices decided in favour of a ‘Great’ ROC in *Judicial Yuan Interpretation No.328* [1993], their political position would definitely anger unconditional independent supporters, which accounted for 3.1% of total population, as well as those who preferred independence (8%). Only supporters who preferred unification (15.6%) and unconditional unification (4.4%) would appreciate the Justices’ political position. However, it was not clear whether supporters who preferred temporary *status quo* and wished to make their decisions in a later time (38.5%) would favour the Justices’ political position or not, whilst even those who supported the ROC unconditionally (9.8%) could be either Great-ROC or Minor-ROC supporters. In other words, according to the 1994 public opinion survey, if the Justices chose the ‘Great’ ROC plan, it would definitely please only 20% of total population. 11.1% would be angered, and the opinion of 48.3% was unknown (*see* Figure 9.4).

#### 9.4 Public Opinion on Great-ROC Proposal, 1994

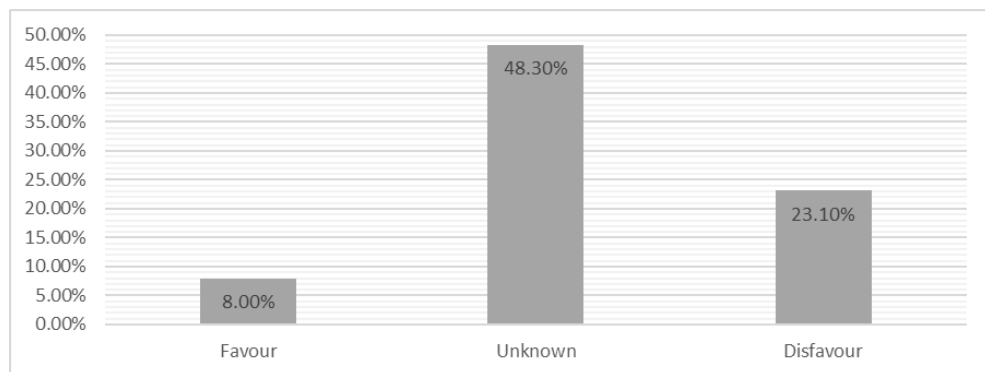


(Source: Compiled by the author)

If the Justices went for the ‘Minor’ ROC proposal in *Judicial Yuan Interpretation*

No.328 [1993], their political position would anger unconditional unification supporters (4.4%) and preferred unification supporters (15.6%). The unconditional independent supporters (3.1%) would dislike the Justices' Minor-ROC decision as well. In the meantime, supporters who preferred independence (8%) would appreciate the Justices' position. However, the temporary *status quo* supporters (38.5%) and the unconditional ROC supporters (9.8%) could still not be categorised into either the pro or the anti group because the temporary *status quo* supporters had made no decision yet, and the unconditional ROC supporters might support either the 'Great' ROC or 'Minor' ROC proposal. In other words, if the Justices chose the 'Minor' ROC plan, this judicial decision only covered a definite 8% of total population, while 23.1% would not approve of the decision and the opinion of 48.3% was unknown (*see* Figure 9.5).

### 9.5 Public Opinion on Minor-ROC Proposal, 1994



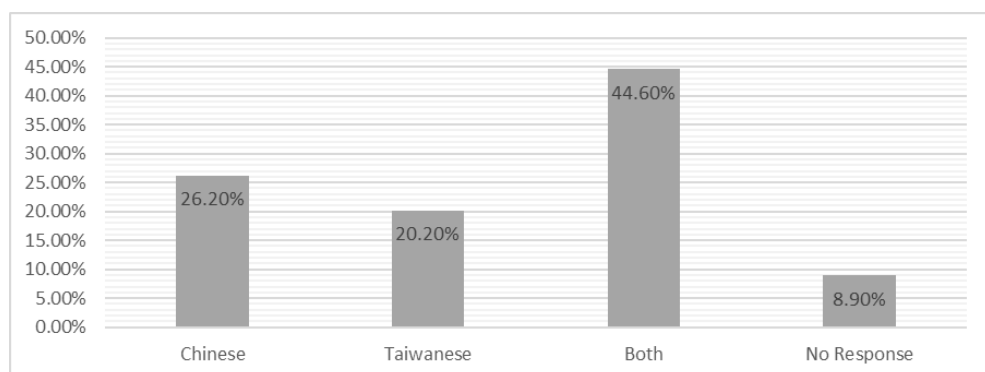
(Source: Compiled by the author)

The above analyses indicate that the Justices would anger at least 20% to 23.1% of Taiwan's population if they were to make a concrete decision in *Judicial Yuan Interpretation No.328* [1993]. Conversely, they could only be confident that between 8% to 11% of the total population would definitely welcome the adjudication. Moreover, 48% of Taiwan's population had not shown a preference for either the Great-ROC or

the Minor-ROC – they could approve or disapprove of the Justices’ decision.

Whilst maintaining a sense of political realism, there was no good direction for the Justices to take in such a sharp political controversy, and it seemed reasonable for them to choose judicial self-restraint (McWhinney, 1986: 99-109) according to the Brandeis formulae.<sup>436</sup> The Justices would become forever unpopular and anger a large proportion of the population if a concrete answer was given – no matter what that answer was. More importantly, the Justices would be tabbed by the public as the unification or independent supporters, which was a situation the Justices strove to avoid.

### 9.6 Public Opinion on Self-identification in Taiwan, 1994



(Source: Election Study Centre, National Chengchi University)

The 1994 public opinion survey on self-identification also demonstrates that it would not be wise for the Judicial Yuan to make a concrete decision. According to this survey, 26.2% of Taiwan’s total population considered themselves as Chinese only, whilst Taiwanese identity accounted for 20.2%. In other words, the ROC was a country in which more than a quarter of its nationals considered themselves to have a national identity that was incompatible with another fifth of the country’s view. Under such

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<sup>436</sup> See *Ashwander v. Tennessee Valley Authority*, (1936) 297 U.S. 288.

circumstances, was it wise for the Judicial Yuan to step into a political controversy on national identification, including national identity and delimitation issues? The answer is obviously no.

### **9.3.4 Conclusion**

As everyone knows, this case was appealed due to the political debate on the reunification/independence issue in the Legislative Yuan; therefore, the consequences would be more serious or deadly if the Judicial Yuan made a concrete answer in this case.<sup>437</sup> (Wu, 2004: 584)

Justice Wu Geng recalled *Judicial Yuan Interpretation No.328* [1993], stating that it was the case in which the Judicial Yuan would confront serious (or deadly) political consequences if a concrete decision was made. As such, the application of the political question doctrine was strategically reasonable. Through this case we can not only learn how the Justices made strategic decisions; more importantly, we learn that they have made strategic decisions simply in order to avoid angering the public. In other words, we find clear evidence that the Justices not only read public opinion but also came to judicial decisions based upon it.

## **9.4 CONCLUSION**

There is no doubt that power must be restricted by its source of power and its allies. We can therefore conclude that a power would avoid angering its source of power or its

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<sup>437</sup> Author's Translation.

allies in practice. In the realm of judicial power studies, Baum constructed a theory based on this idea, indicating that judicial decision-makers may ‘present themselves in certain ways in order to gain something concrete from an audience’ (Baum, 2006: 28). In other words, judges would not only please the audiences but also avoid angering them ‘in order to gain something concrete from an audience’ (ibid).

In Taiwan, we can see that Taiwan’s public opinion was the most crucial audience for the Judicial Yuan in the 1990s, because the Justices obtained great political power from the alliance between the judiciary and public opinion. The Justices would therefore choose silence in response to an event in which public opinion had strong bias, and they would refuse to become involved in an event in which public opinion was radically divided. In such cases, the Justices either lacked the courage of their convictions or simply tried hard to avoid involving themselves in a political morass. Such judicial deference shows how influential public opinion was.

In *Judicial Yuan Interpretation No.476* [1999], Justice Su Jyun-Hsiung left a puzzle behind. He was one of the most vocal critics of capital punishment in Taiwan, but he wrote no dissenting opinion against the ultimate decision on capital punishment, remaining completely silent. However, he continued to publish academic books regarding anti-capital punishment after this case was decided.

In *Judicial Yuan Interpretation No.328* [1993], the Justices chose to apply the political question doctrine for the first time in history, holding that the delimitation of ROC territory is beyond the remit of the judicial power. However, the Judicial Yuan was constantly involved in political controversies in the 1990s, providing final resolutions all the time, so it is unusual for the Justices to claim that they were unable to decide a

case due to its inherent political controversies. The Justices chose to avoid making a concrete decision in *Judicial Yuan Interpretation No.328* [1993] for strategic reasons – they knew it would be unwise to make any decision on issues in which the state was so divided between reunification and independence.

## 10: CONCLUSION

### 10.1 INTRODUCTION

Woe to him that claims obedience when it is not due; woe to him that refuses it when it is. – Thomas Carlyle (1840)

This thesis footnotes the expansion of judicial power in Taiwan in the 1990s through Carlyle's aphorism, and responds to the question Ginsburg asked:

How can a constitutional court that served an authoritarian regime become an instrument for democracy and human rights? (Ginsburg, 2003: 106)

It is easy to see that the ROC constitutionalism follows the spirit of judicial supremacy. The constitutional text, structure and context, as well as the country's legal culture in general, provide the Judicial Yuan with massive constitutional powers with no attempt to install formal-legal restrictions. This means in theory that the Justices will always have sufficient power to check-and-balance other branches of government, and have done since the implementation of the ROC Constitution. However, the Judicial Yuan was a much weaker state organ before the Justices found a way to turn public opinion into a key political ally. In other words, public opinion in Taiwan in the 1990s was the real springboard for judicial power expansion, as the other branches as institutional safeguards against judicial supremacy proved ineffective in political terms.

Taiwan's judicial power expansion, in terms of the tools at the Justices' disposal, was

also deeply rooted in traditional Chinese culture. The need for judicial decision makers within Chinese society offered more space for the exercise of judicial power and fewer bounds to this power because of the strong Chinese tendency towards substantive justice. As long as a judicial decision maker could pursue ‘substantive justice in accordance with public opinion’, he or she would not risk facing questions about procedural imperfections or judicial overreach. Likewise, the counter-majoritarian difficulty (Bickel, 1962: 9-22) – or rather the counter-majoritarian myth – fades into the background as soon as we learn to appreciate constitutional courts as majoritarian institutions. This thesis has illustrated via various case studies that the majority of Taiwanese society supports the Judicial Yuan not merely as an institution but also in terms of the specific political choices the court makes, giving the Judicial Yuan indirect democratic legitimacy. The social context of public opinion and public support stimulate Taiwan’s Justices into strategic decision-making in alignment with public opinion. In other words, Taiwan’s Justices need to be skilled readers of public opinion before making decisions, because they were well aware that it represents not only their safeguard against political intervention but also the best method of judicial power expansion.

This concluding chapter revisits the role of constitutional design and traditional culture to illustrate how fertile and welcoming the environment was for judicial power expansion. The two crucial variables developed by this thesis will be re-examined to form a conclusion that Taiwan’s judicial power expansion in the 1990s was an upshot of the link between the ROC’s constitutional design and its traditional culture. It is therefore probable that the Justices would stand in line with public opinion by using their powers of judicial review actively and strategically as guardians of the constitution, whilst remedying Taiwan’s occasional defects in representative democracy as an



alternative lawmaking body.

*Res dura, et regni novitas, me talia cogunt. Moliri, et late fines custode  
tueri.* – Publius Vergilius Maro (70-19BCE)

## **10.2 VARIABLE ONE: CONSTITUTIONAL DESIGN**

[T]he jurisdiction of the [Republic of China's] judiciary not only refers to adjudications between civilians and civilians, or between civilians and officials, but further includes constitutional judicial review power against both congressional legislations and the President's administrative discretion. [Our] rule of law shall not be considered successful, ultimate or prefect until such a power is exercised, the power of judicial supremacy.<sup>438</sup> – Carsun Chang (1946)

Carsun Chang's opinion on the fundamentals of the ROC constitutional design in 1947 illustrates that the ROC Constitution of 1947 was deliberately designed to pursue judicial supremacy – which is what Carsun Chang wanted. As long as the Constitution was being implemented, it is reasonable to predict that judicial power expansion within the ROC would be a strong probability, because the fundamental constitutional design provides an excellent breeding ground for such an expansion.

It is also reasonable to conclude that the ROC Constitution embodies the spirit of judicial supremacy. The Constitution on one hand provides a series of safeguards

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<sup>438</sup> Author's Translation.

against political intervention towards the judiciary.<sup>439</sup> On the other, it also deliberately authorises a huge amount of power to the judiciary<sup>440</sup> without providing any specific strategies or limitations to that power. Judicial activism was thus designed to play an important part in ROC constitutionalism – subject to a condition whereby the Justices can find the way (through judiciary-public opinion alliance) of using it in politics. In other words, Carsun Chang chose the Justices as the ‘guardians of the constitution’ intentionally, but gave no political resolution of how this judicial activism could be achieved. The Justices waited for Taiwan’s political fragmentation through democratisation in 1990, when the diffusion of political power in other branches of government took place (Ginsburg, 2003: 106-157). They then opened up a political space for judicial power expansion by putting institutional roles into play, in which Carsun Chang expected the Justices to have the last word.

By elucidating the concept of the guardian of the constitution, Chief Justice Weng Yueh-Sheng tells us that the deliberations of the Constituent Assembly in 1946 foresaw the Judicial Yuan becoming involved in political controversies:

The Constitution expects much from the Justices of the Judicial Yuan; [as a result], many constitutional articles [deliberately] express that laws that are in conflict with the Constitution, orders that are in conflict with the Constitution or with laws, and local autonomous regulations and rules that are conflict with the Constitution shall all be rendered null and void. In addition, [the Constitution] repeatedly emphasises that when

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<sup>439</sup> Compare Constitution of R.O.C. § 81 (1947) (Gesetzesvorbehalt), with Constitution of R.O.C. § 80 (1947) (Verfassungsvorbehalt).

<sup>440</sup> Compare Constitution of R.O.C. § 77 (1947), with Constitution of R.O.C. § 78 (1947), Constitution of R.O.C. § 114 (1947), and Constitution of R.O.C. § 115 (1947).

doubt arises as to whether or not [a law, order or local autonomous regulation and rule] is in conflict with the Constitution, ‘interpretation thereon shall be made by the Judicial Yuan’, and that ‘an unconstitutional article shall be null and void’ if it is held to be unconstitutional by the Judicial Yuan. [What is more], the Constitution ignores the judicial power’s passive nature, authorising the Judicial Yuan to use a semi-active judicial review power over the [ROC] Provincial Self-Government Regulations – ‘the Regulations of Provincial Self-Government shall, after enactment, be forthwith submitted to the Judicial Yuan’ [for active judicial review] [...] <sup>441</sup> (Weng, 1976: 475-476)

Even pre-democratisation, the authoritarian government would not be able to directly and openly override a Judicial Yuan decision. For instance, in 1960, the Judicial Yuan decided via *Judicial Yuan Interpretation No.86* [1960] that both the district courts and high courts should be subordinated to the Judicial Yuan, and the Executive Yuan seemed to accept this judicial decision. However, retaliation could take place by stealth: under the name procedural hand-over, the Executive Yuan took 19 years to carry out the court’s order (Tung, 2005: 442). However, we can conclude from this event that the court’s order could not be openly disregarded even in the pre-democracy era, or the Executive Yuan would stand accused of attempting to disregard the Constitution altogether.

When we look back at China in 1946, we find a surprising constitutional meme of judicial activism which ROC nationalists embraced, but which was also driven forward

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<sup>441</sup> Author’s Translation.

by another actor – the Communist Party. According to Carsun Chang’s recollection, the Communist Party – albeit somewhat unbelievably – played a massively important role in the construction of the Judicial Yuan’s role (Yang, 1993: 130-131). They were China’s first political interest group to favour judicial activism by virtue of their political need to check and balance the ruling Nationalist Party (ibid). In other words, the Judicial Yuan’s political role was planned deliberately by important actors within the constitution-making process, giving birth to the notion that the Justices could be vital political mediators within the ROC political system. Ironically, it was originally promoted by the Chinese communists (ibid), even though judicial activism was no longer welcomed after they took power on the Chinese mainland. However, since the communists attempted to check and balance the ruling Nationalist Party through the constitutional use of judicial power, the 1947 Constitution was given an institutional power challenging authority in the form of the Judicial Yuan. The democrats later took advantage of this power in a political game in which the judiciary was used as a mediator (Brams, 2004: 199-242) – a role which had already been deliberately provided for that purpose.

As a matter of fact, the most common political theme behind political demonstrations against the Nationalist Party during Taiwan’s dictatorship period was accusing the nationalists of unconstitutionality. The regime was referred to as unlawful unless and until Taiwan’s full democratisation according to the ideals of the Constitution (Lee, 2009: 282-283):

[T]here are still many political realities that are not truly compatible with the ideal of the Constitution. [Thus], we eagerly expect the [Nationalist] Government to serve this Constitution loyally without any far-fetched

excuses of unconstitutionality.<sup>442</sup> (Taiwan Times Editorial, 1987: 44)

Carsun Chang's Constitution offered a unique political path towards democracy, and over the following decades the Justices followed that path well. In the 1950s, the ROC aimed to retake the Chinese mainland, an operation which required the country to live under a state-of-emergency political system. The Justices supported the system via *Judicial Yuan Interpretation No.31* [1954] and judicial review power was restricted accordingly. But public opinion in the ROC shifted towards the acceptance of the *status quo* in the late 1980s, and the necessity of state-of-emergency was called into questioned constitutionally. The Judicial Yuan therefore chose political assertion in *Judicial Yuan Interpretation No.261* [1990] on the basis of public opinion, and the political space for the expansion of judicial power opened up accordingly:

1. Taiwan's political demonstrators stood against their authoritarian government in the name of unconstitutionality, and the government faced losing legitimacy because it could not accuse the demonstrators of illegality. In comparison with other autocracies, Taiwan's model of democratic transition was easier because of state theory and political ideologies the constitutional design embodied.
2. If the ROC Constitution was being implemented fully, the judiciary would become the ultimate winner of this political game because of the constitutional design. This was sufficient cause for the Judicial Yuan to lead the people of Taiwan towards democracy.

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<sup>442</sup> Author's Translation.

3. Here is a chicken or egg problem. It is reasonable to conclude that the Judicial Yuan encouraged the people of Taiwan towards democracy by using its constitutional judicial review power at critical moments. It is also reasonable to claim that the Justices dared to challenge the authoritarian government because it had the support of the people of Taiwan and their desire for democratic constitutionalism. However, it is irrelevant to argue which came first or whether judicial review power or public opinion is more important. What matters is that the Judicial Yuan achieved judicial power expansion by standing side by side with the public, sincerely committed to the interests and welfare of the people of Taiwan.

In a nutshell, the Judicial Yuan made a shrewd political move with *Judicial Yuan Interpretation No.261* [1990], giving them massive amounts of political credibility as the best political mediator within the political system in Taiwan (Interview with Li on 17-JUN-2013). This historical event, what Ackerman calls ‘a constitutional moment’ (Ackerman, 1991: 1-324), no doubt strengthened the Judicial Yuan’s political role as the ultimate political mediator with the power of the last word, expanding the Justices’ political influence and, in consequence, materialising the Constitution’s original design for the ROC judiciary.

### **10.3 VARIABLE TWO: LAW AND SOCIETY**

The pursuit of substantive justice was the original value orientation of China’s legal system, and the emphasis on substantive justice and the neglect of procedural justice became barriers to the rule of law. The

system paid no regard to whether or not law enforcement or court rulings were carried out in accordance with the law; as long as the result was favourable, there was no need to care about procedural details. (Wang, 2010a: 38)

For the Chinese, substantive law always represents the ultimate sense of fairness and social justice, which for the most part is reflected by the customs, practices and usages of Chinese society. The written law is only a form through which to realise justice. As long as justice is done, people are not bothered too much about the statutory basis of the judgement. To most Chinese, 'due process' is an unknown quantity. To the legal profession, it is something desirable, rather than something indispensable. (Gao, 1989: 89-116)

The Chinese cultural preference for substantive justice implies that Chinese society provides more space and less constraint for the exercise of judicial power, because due process is only 'desirable' rather than 'indispensable' (ibid). For example, Judge Chou Yu-Lan says:

If there is a conflict between substantive justice and procedural justice, unless it is a serious infringement of the defendant's personal rights, I will prioritise substantive justice.<sup>443</sup> (Interview with Chou on 24-JUN-2013)

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<sup>443</sup> Author's Translation.

Although it is debatable whether or not public opinion is equal to substantive justice in theory, and where to draw the line between populist justice and substantive justice, there is no doubt that substantive justice is broadly supported as the view held by the Chinese majority. In other words, as long as the Justices pursue substantive justice in broad alignment with public opinion, their political influence will immediately grow, unobstructed by formalism or procedural details. To benefit as much as possible from indirect democratic legitimacy, it becomes important for the Justices to learn to read public opinion and make strategic decisions accordingly:

In terms of whether the Justice of the Republic of China take public opinion seriously or not, [and] the question of whether [they] read public opinion or not, I think, speaking overall, it is nearly impossible for a jurist in the Republic of China, including Justices and judges, to completely ignore social reactions [...] <sup>444</sup> (Interview with Ma on 19-JUL-2013)

Generally speaking, whilst the atmosphere is that public opinion obviously supports the Justices of the Judicial Yuan, the Legislative Yuan would never act rashly and blindly! <sup>445</sup> (Interview with Li on 17-JUN-2013)

In summary, this thesis highlighted the fact that Taiwan's 1947 constitutional design embraced judicial activism with no strict formal legal limitations; Meanwhile, we can learn from Taiwan's judiciary-public opinion alliance that judicial activism in Taiwan

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<sup>444</sup> Author's Translation.

<sup>445</sup> Author's Translation.



is both politically supported and limited by public opinion. The interdisciplinary analysis this thesis adopted has verified the influence of public opinion upon Taiwan's judicial decision-making using an *ex adverso* legal-political validation, by which we have learned that since public opinion became a crucial variable over judicial decision-making because the court could not achieve judicial activism without public support, there is no longer much space for sincere judicial decisions.

Looking at political question doctrine cases has helped us assess the extent to which there was theoretically 'no limit to' (Stennis, 1958: 1179-1181) but only 'self-imposed limits on' (Neubaver and Meinhold, 2010: 441-472) judicial power in Taiwan. The constitutional restrictions against judicial power expansion in Taiwan in accordance with related constitutional interpretative theories did not create a legally binding force over time. However, we have discovered that strong public opinion and preferences are a clear boundary the court will not cross, and this in reality constitutes a limitation on judicial power expansion – a limitation which clearly emerged when considering the death penalty in Taiwan.

If we choose to see public opinion in a positive light, we learn from Taiwan that a judiciary can be powerful as an alternative lawmaker at moments when representative democracy fails. In Germany, on the 24th of March 1933 when the Enabling Act was passed, no guardian of the Weimar Constitution chose to stand against the Nazis on behalf of the German people; however, on the 3rd of September 1999, when the Fifth Additional Article of the ROC Constitution was passed, the Judicial Yuan struck it down with clear public support through *Judicial Yuan Interpretation No.499* [2000]. If Taiwan's mechanism of accountability – whether the lawmaker is elected or unelected – is relevant to political legitimacy, the 3rd of September 1999 could be seen as

Taiwan's 24th of March 1933. If Taiwanese society had paid less attention to the political values that embrace legitimacy deriving simply from power used justly, there would have been no legendary dissolution of congress case<sup>446</sup> either, and Taiwan's political miracle of peaceful democratisation would not have come to pass.

When we look at public opinion in a negative light, and bear in mind the dangers of populism, we learn from Taiwan that not all public preferences play constructive roles for deliberative democracy, and at some point the courts will encounter a case in which they cannot defer to strong public opinion without being politically harmed in the process. The courts must be strategic, but wise strategists think long term too. In the repetitive game of judicial review, exclusive judicial attention to 'the mainstream human rights of the majority, and have a poor sense of human rights protection for the minority and the disadvantaged'<sup>447</sup> (Li, 2012: 346) might build only short-term institutional legitimacy. If the courts seek never to anger the vast majority of their audience today, their judicial choices to not support the struggle of society's weakest sectors can lead to de-limitising legacies in the long run. In Taiwan, the notorious *Judicial Yuan Interpretation No.618* [2006] that openly discriminates against new mainland Chinese immigrants<sup>448</sup> to Taiwan is the best example. Although this case is beyond the remit of this thesis, it hints at the possibility of changing meanings of the judiciary-public opinion alliance in the new millennium.

## 10.4 STATISTICAL INSIGHTS

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<sup>446</sup> *Judicial Yuan Interpretation No.261* [1990].

<sup>447</sup> Author's Translation.

<sup>448</sup> Like China's legal tradition of *lex talionis* in Taiwan's death penalty cases, this case touches the core of Chinese morality: do enemies deserve equal fundamental rights? Here we see that the Justices deferred to public opinion.

As shown in previous chapters, this thesis is committed to a data-heavy approach for the study of judicial decision-making of the Judicial Yuan. This is particularly true of Chapter 5, in which a series of background studies of media, the judiciary, the Judicial Yuan and the Justices were statistically reviewed. In addition, case law analyses (*see also* Chapters 6 to 9) were influenced by existing models of statistical analysis within the field of judicial behaviourism. In contrast to the existing Taiwanese legal scholarship, which focuses exclusively on doctrinal analysis, this thesis offered unique insights by examining the history of the Judicial Yuan through statistical insights – which of course represents a new and entirely different scientific approach which in the case of Taiwan has not been used or tested before. However, the main difficulty in applying this new approach to a country like Taiwan, which has never used statistics to study judicial decision-making, was where to find the data?

All data-sets used in this thesis were compiled from massive official data collections. Although the data were not collected for the purpose of understanding judicial decision-making in Taiwan, this thesis sieved out relevant information from apparently unrelated documents and linked them together for theoretical analysis. This is a new and original approach. All data-sets labelled as ‘compiled by the author’ are original, and nothing similar has been displayed before despite the fact that they originate from official statistics collected by the ROC Government. The compilation required Chinese linguistic skills as well as knowledge of Taiwanese jurisprudence.

If we take the Justices’ signatures as an example, they are used only for formalities and few researchers pay attention to them. Even on the Judicial Yuan’s online database, the Justices’ signatures are not regularly listed. However, the research behind this thesis led to the discovery of a document that lists the Justices’ signatures in each case, namely

the Judicial Yuan Gazette, which is issued on a monthly basis. With the knowledge of relevant jurisprudence, these signatures were counted case by case, revealing the actual size of each bench in each case for the first time, along with an unequivocal bill of absence for the Justices. By looking this bill of absence, this thesis was able to discover that all the crucial cases in the 1990s were decided *en banc*, and the order of the Justices' signatures was also checked (*see also* Chapter 5).

For *Judicial Yuan Interpretation No.261* [1990], the data-sets compiled by this thesis from the instrument of appeal also profile the political weight of this legendary case. The 26 legislators who signed this instrument included 1 President, 2 premiers, 1 vice premier, 5 ministers and 1 vice minister, 2 county mayors and 1 vice mayor. How can we thus hold that the Judicial Yuan has obtained no political rewards afterwards by linking themselves with such a legendary decision (*see also* Chapter 6)? In Taiwan, legal professionals commonly agree that the political role of the Judicial Yuan has become more and more important since *Judicial Yuan Interpretation No.261* [1990] (Weng, 1998: 310-311). The concrete evidence presented by this thesis via case-coding takes the argument to a new empirical level. Similarly, the coding and data shows how power is balanced, continuously shifting back and forth between the various branches of Taiwan's government. This can be properly explained by the classifications of the judicial reviews requested by state organs (*see also* Chapter 7). However, no Taiwanese academics has previously undertaken any case-coding, and no such a trend has been used to study the exercise of judicial power in the field of judicial politics. Whilst jurists have read and analysed these cases as much as the author of this thesis, the only thing they did not do is categorise the cases according to type, nature and names of appellant and defendant. The search for patterns through case-coding is difficult for Taiwanese legal academics because most of them are not trained that way and would not intuitively

embrace such a method to study judicial behaviourism. At the same time, case-coding would be an impossible task for foreign legal academics because of their difficulty to acquiring linguistic skills in classical Chinese.

The Taiwanese unawareness of judicial behaviourism in the legal academic field constituted a ‘virgin territory’ for this thesis to explore. We already know whether a judicial decision is logical and compatible to the Taiwanese jurisprudence because of its repetitive examination via doctrinal analysis. But why a judicial decision is made in a particular way remains surprisingly unaddressed. Lawyers and jurists in Taiwan have wondered, but none have attempted to analyse this aspect of the judicial approach scientifically. As another example, this thesis discovered through case-coding that as far as the 1990s were concerned, no claim pertinent to the special power relationship was ever lost (100% odds) and no claim related to mainland Chinese affairs was ever won (0% odds) (*see also* Chapter 8). Furthermore, no Taiwanese legal study before this thesis has attempted to explain why the odds in the aforementioned cases were so extreme. All the data-sets compiled by this thesis reflect Taiwanese public opinion, but no one has ever analysed this scientifically before, thus opening up the possibility of an entirely different type of discourse and putting the Judicial Yuan back on the map of comparative analysis too.

Fresh theoretical approaches lead to different ways of looking at a case. There is no doubt that capital punishment is still supported by a strong and absolute majority of the Taiwanese public. For this thesis, then, what stands out is not jurisprudential coherence or precedent – but the unusual decision made by Justice Su Jyun-Hsiung in *Judicial Yuan Interpretation No.476* [1999] (*see also* Chapter 9). The silence of Justice Su leads this thesis to suspect that he decided strategically because of public opinion, and this

decision is supported by statistics in relation to Taiwan's public opinion on capital punishment.

## **10.5 INTERVIEWS AND ARCHIVAL STUDIES**

Fieldwork for the interview project began in May 2013 and was expected to last at least until September 2013; however, the original plan for the second round of fieldwork was suspended because of the discovery of the Judicial Yuan's oral historical project that consists of the retired Justices' official interviews. The Justices interviewed drew the researcher's attention to these official interviews. The author searched out the entire collection at the Taipei National Central Library. The aforementioned statistical analysis conducted for this thesis was mainly carried out in May 2013, and all the data-sets compiled by this thesis point overwhelmingly to a single conclusion – that public opinion was the most important variable influencing the decision making of the Judicial Yuan during the 1990s. The qualitative engagement with the interview project was conducted in accordance with the data-sets compiled, aiming to back up and explain the statistical analysis by talking to the Justices and other people involved.

This thesis is at times based upon the common-sense expectations of Taiwanese citizens in relation to public opinion. For example, in the legendary *Judicial Yuan Interpretation No.261* [1990], none of the Justices interviewed doubted whether Taiwan's public opinion in 1990 preferred democracy – this fundamental question was not tested through a Judicial Yuan initiated opinion poll, but was a common-sense expectation. Chairman Hsu Hsin-Liang, who led the democrats, chose the word 'self-evident' (Interview with Hsu on 10-MAY-2013) accordingly. Hence, when the Justices went directly to discussing *Judicial Yuan Interpretation No.261* [1990] when interviewed,

saying:

We the Justices had already noticed the changing political atmosphere in which [our] nationals wanted a constitutional reform, whereas our people's desire was just. Therefore, the fifth-term Justices had a common consensus that we should push the country's constitutional and political system towards this necessary reform.<sup>449</sup> (Interview with Ma on 13-JUL-2013)

No criticism is needed because this is already the Chinese way the Justices said they had been influenced by public opinion.<sup>450</sup>

Cultural characteristics that govern conversations, the professional codes of judges and in particular their codes of honour also encouraged increased attention to archival studies. When the oral history project conducted by the Judicial Yuan was introduced by the Justices to the author of this thesis, it implied that official interview is the criteria for citation directly used by the Justices interviewed according to Chinese culture. Anything beyond the official interview requires additional permission. At first sight, this may seem to be bad news for this researcher, but in reality it was not. The Chinese elites have a long history of writing, and they prefer to write down their stories and ideas in their own words (in books, memoirs and articles) or through official records – Chinese elites have even self-published their writings (*e.g.*, Justices Wang Tze-Chien and Wu Geng) because of their desire to tell the story in their own way. In other words,

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<sup>449</sup> Author's Translation.

<sup>450</sup> A confirmation such as 'Yes, I was definitely influenced' is almost impossible to elicit in Chinese culture.

the Justices tell the stories they want to tell in exactly the way they want to tell. This can be mistaken for formalism – because of the written format – but the result is enormously information-rich. Hence, many Justices interviewed suggested that their books and official interview should suffice in terms of the qualitative ambitions of this thesis, and additional interviews would only be conducted when the author of this thesis had specific additional questions.

Reading the official interviews conducted by the Judicial Yuan through its oral history project is a transformative experience for any researcher. Whilst the quality of these archives is outstanding by any standards, the value of the official interviews has not yet been broadly appreciated in Taiwan because almost no Taiwanese legal academic before this thesis had gone beyond the classical doctrinal analysis and expanded the Taiwanese jurisprudence into the realm of judicial behaviourism. Taiwan's political scientists pay little enough attention to the Judicial Yuan in the first place. Whilst the entire collection of the oral history project conducted by the Judicial Yuan has been accessible in the National Central Library for a decade, almost no citations of or references to it can be found. The author of this thesis especially recalls the reaction of Justice Herbert H.P. Ma when he found out about this thesis: he sighed and said that almost no one in the researcher's generation has the patience to listen to his stories anymore, and worried that the wisdom of his generation is vanishing.

## **10.6 CONCLUSION**

Taiwan's judiciary-public opinion alliance in the 1990s could be read in two ways. Firstly, it was the Justices' strategy against political intervention as they aimed to become Taiwan's guardians of the constitution. Their decisions were strategic responses



to the political atmosphere of the day. Secondly, the Chinese cultural tradition provides a fertile ground for judicial power as long as the Justices pay careful attention to public opinion as a primary judicial audience. The formula behind the success of Taiwan's judicial power expansion in the 1990s therefore consisted of strategic decision-making in accordance with the public opinion of the time, eventually resulting in the institutional judicial supremacy stipulated by the ROC Constitution.

Ginsburg's insurance model (Ginsburg, 2003: 25) studied the Judicial Yuan's power expansion through separation of powers games between various branches of Taiwan's government (*see also* Chapter 7), in which weakened political actors insure themselves for the future by committing to judicial review. However, the explanation for the opportunity of judicial power expansion, is different from the reasons why the Justices chose to take on this role in general, and the insurance model also fails to explain periods of judicial deference.

To set a background, this thesis also acknowledges the work of Pritchett, Murphy, Schubert, Baum, Epstein, Knight, Staton, and Vanberg, reconstructing a strategic model that isolates public opinion as Taiwan's most important judicial audience in the 1990s, a period during which the Judicial Yuan knew it had little to fear in terms of retaliation by the executive and the legislature because of the judiciary-public opinion alliance. Justices could choose to impose their will on other branches of government without fear of retribution, and when the court deferred to strong public opinion, our model continues to deliver insights through the identification of the political limitations of judicial power expansion.

In a nutshell, this thesis began by illustrating the enormous expansion of judicial power

in Taiwan since the 1990s. Such expansion was partly due to the ROC's specific constitutional design and Chinese legal culture. The Justices of the Judicial Yuan were deliberately designated as guardians of the ROC Constitution by Carsun Chang, and correspond to strong cultural expectations of an alignment between judicial decision-making and public opinion. These variables provide not only a path for judicial power expansion, but also a strong moral and cultural sense of responsibility that underlies judicial decision-making (Anson et al., 2009: 211) and feeds the judiciary-public opinion alliance (Baum, 1997: 89-124; Shapiro, 1981: 157-193). It seems fitting to end this thesis with an aphorism by Zhang Zai, a Chinese Neo-Confucian philosopher, with regard to the expected moral and cultural behaviour of Chinese intelligentsia:

[A Chinese intellectual shall] maintain the Confucian merciful morality in the Universe, providing knowledge for the masses, inheriting the ancient wisdoms from and for [our] sages, as well as creating an epoch of peace and prosperity for [our] descendants.<sup>451</sup> – Zhang Zai (1020-1077)

The Justices are willing, expected and empowered to expand judicial power culturally and constitutionally as long as they attempt to safeguard the imagined will of the people from perceived defects of the political system. The Justices of the Judicial Yuan are encouraged to be activists, to imposing their will – the people's will – upon the other branches of government, overriding executive actions and acts of the legislature as an alternative lawmaker in the name of indirect democracy.

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<sup>451</sup> Author's Translation.

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Official Interview with Justice Chen Rui-Tang on 23 and 26 November 2002

Official Interview with Justice Herbert Han-Pao Ma on 11 November 2003

Official Interview with Justice Hwang Yueh-Chin in November 2009

Official Interview with Justice Lin Kuo-Hsien on 22 August 2006

Official Interview with Justice Shih Shen-An in November 2009

Official Interview with Justice Su Jyun-Hsiung in November 2009

Official Interview with Justice Sun Sen-Yen on 28 November 2004

Official Interview with Justice Tai Tong-Schung in October 2010

Official Interview with Justice Tseng Hua-Sun on 13 October 2006

Official Interview with Justice Tung Hsiang-Fei in November 2009

Official Interview with Justice Vincent Sze in January 2011

Official Interview with Justice Wu Geng on 19 October 2004

Official Interview with Justice Yang Huey-Ing on 06 October 2004

Official Interview with Justice Yang Yu-Ling on 26 November 2002

Personal Interview with Chairman Hsu Hsin-Liang on 10 May 2013

Personal Interview with Chairman Lin Chih-Chung on 3 July 2013

Personal Interview with Chairman Wu Jan-Fu on 31 May 2013

Personal Interview with Judge Chou Yu-Lan on 24 June 2013

Personal Interview with Justice Herbert H.P. Ma on 19 July 2013

Personal Interview with Justice Lin Tzu-Yi on 16 May 2013

Personal Interview with Professor Nigel N.T. Li on 17 June 2013



## BACKGROUND OF THE JUSTICES

### APPENDIX (A): PERSONAL BACKGROUND OF THE FIFTH-TERM JUSTICES

JUSTICE	ORIGIN	BIRTHPLACE
<b>WENG Yueh-Sheng</b> (1932 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>CHAI Shau-Hsien</b> (1924 – )	Jilin (Mainlander)	Fengtian Province, Republic of China
<b>YANG Yu-Ling</b> (1925 – )	Sichuan (Mainlander)	Sichuan Province, Republic of China
<b>LEE Chung-Sheng</b> (1923 – )	Unknown (Mainlander)	Henan Province, Republic of China
<b>YANG Chien-Hua</b> (1927 – 1998)	Jiangsu (Mainlander)	Jiangsu Province, Republic of China
<b>YANG Zu-Zan</b> (1933 – 1994)	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>Herbert Han-Pao Ma</b> (1926 – )	Anhui (Mainlander)	Hubei Province, Republic of China
<b>LIU Tieh-Cheng</b> (1938 – )	Hebei (Mainlander)	Hebei Province, Republic of China
<b>CHENG Chien-Tsai</b> (1925 – )	Fujian (Mainlander)	Fujian Province, Republic of China
<b>WU Geng</b> (1940 – )	Hainan (Mainlander)	Canton Province, Republic of China
<b>SHIH Shen-An</b>	Shandong	Shandong Province,

(1923 – )	(Mainlander)	Republic of China
<b>CHEN Rui-Tang</b> (1928-2010)	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>CHANG Cheng-Tao</b> (1922 – )	Liaoning (Mainlander)	Fengtian Province, Republic of China
<b>CHANG Teh-Sheng</b> (1923 – )	Jiangxi (Mainlander)	Jiangxi Province, Republic of China
<b>LEE Chih-Peng</b> (1932-2004)	Guizhou (Mainlander)	Guizhou Province, Republic of China

(Source: Compiled by the author)

#### **APPENDIX (B): PERSONAL BACKGROUND OF THE SIXTH-TERM JUSTICES**

<b>JUSTICE</b>	<b>ORIGIN</b>	<b>BIRTHPLACE</b>
<b>WENG Yueh-Sheng</b> (1932 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>LIU Tieh-Cheng</b> (1938 – )	Hebei (Mainlander)	Hebei Province, Republic of China
<b>WU Geng</b> (1940 – )	Hainan (Mainlander)	Canton Province, Republic of China
<b>WANG Ho-Hsiung</b> (1941 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>WANG Tze-Chien</b> (1938 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>LIN Young-Mou</b> (1938 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan

<b>LIN Kuo-Hsien</b> (1936 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>Vincent SZE</b> (1933 – )	Zhejiang (Mainlander)	Zhejiang Province, Republic of China
<b>CHENG Chung-Mo</b> (1938 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>SUN Sen-Yen</b> (1933 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>CHEN Chi-Nan</b> (1937 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>TSENG Hua-Sun</b> (1936 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>TUNG Hsiang-Fei</b> (1933 – )	Jiangsu (Mainlander)	Jiangsu Province, Republic of China
<b>YANG Huey-Ing</b> (1934 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>TAI Tong-Schung</b> (1937 – )	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>SU Jyun-Hsiung</b> (1935 – 2011)	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>HWANG Yueh-Chin</b> (1941 – 2009)	Taiwan (Taiwanese)	Taiwan Colony, Imperial Japan
<b>LAI In-Jaw</b> (1946 – )	Taiwan (Taiwanese)	Taiwan Province, Republic of China
<b>HSIEH Tsay-Chuan</b>	Taiwan	Taiwan Colony,

(1944 – )	(Taiwanese)	Imperial Japan
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(Source: Compiled by the author)

### APPENDIX (C): EDUCATION BACKGROUND OF THE FIFTH-TERM JUSTICES

JUSTICE	EDUCATION BACKGROUND
<b>WENG Yueh-Sheng</b>	<i>(Constitutional and Administrative Law)</i>  Dr.Iur. – Universität Heidelberg  LL.B. – Taiwan University  A.A. – Tainan Normal School
<b>CHAI Shau-Hsien</b>	<i>(Constitutional Law and Criminal Law)</i>  LL.M. – Yale University  LL.B. – Northeastern University
<b>YANG Yu-Ling</b>	<i>(Civil Law and Civil Procedure)</i>  Dip. – Institute for Defense Studies  Dip. – Institute of Policy Development  LL.B. – Chengchi University
<b>LEE Chung-Sheng</b>	<i>(Legal Philosophy and Legal History)</i>  LL.B. – Anhui University
<b>YANG Chien-Hua</b>	<i>(Civil Procedure)</i>  N/A – (But he was a legendary master)
<b>YANG Zu-Zan</b>	<i>(Legal Philosophy)</i>  S.J.D. – Tokyo University  LL.M. – Tokyo University  LL.B. – Taiwan University  A.A. – Tainan Normal School

<b>Herbert Han-Pao Ma</b>	<i>(Legal Philosophy)</i>  LL.B. – Taiwan University
<b>LIU Tieh-Cheng</b>	<i>(Private International Law)</i>  S.J.D. – University of Utah  LL.M. – Southern Methodist University  LL.B. – Chengchi University
<b>CHENG Chien-Tsai</b>	<i>(Civil Law and Civil Procedure)</i>  Dip. – Institute for Defense Studies
<b>WU Geng</b>	<i>(Constitutional and Administrative Law)</i>  Dr.Iur. – Universität Wien  M.A. (Politics) – Taiwan University  LL.B. – Taiwan University
<b>SHIH Shen-An</b>	<i>(N/A)</i>  LL.B. – Central University
<b>CHEN Rui-Tang</b>	<i>(N/A)</i>  LL.B. – Taiwan University
<b>CHANG Cheng-Tao</b>	<i>(N/A)</i>  LL.B. – Changchun University
<b>CHANG Teh-Sheng</b>	<i>(Civil Law and Commercial Law)</i>  M.A. (Politics) – Harvard University  LL.B. – Chengchi University
<b>LEE Chih-Peng</b>	<i>(Civil Law and Legal Philosophy)</i>  S.J.D. – California Institute of Law  LL.M. – Southern Methodist University  LL.B. – Taipei University

**APPENDIX (D): EDUCATION BACKGROUND OF THE SIXTH-TERM JUSTICES**

<b>JUSTICE</b>	<b>EDUCATION BACKGROUND</b>
<b><i>WENG Yueh-Sheng</i></b>	<i>(Constitutional and Administrative Law)</i>  Dr.Iur. – Universität Heidelberg  LL.B. – Taiwan University  A.A. – Tainan Normal School
<b><i>LIU Tieh-Cheng</i></b>	<i>(Private International Law)</i>  S.J.D. – University of Utah  LL.M. – Southern Methodist University  LL.B. – Chengchi University
<b><i>WU Geng</i></b>	<i>(Constitutional and Administrative Law)</i>  Dr.Iur. – Universität Wien  M.A. (Politics) – Taiwan University  LL.B. – Taiwan University
<b><i>WANG Ho-Hsiung</i></b>	<i>(Administrative Law)</i>  S.J.D. – Chengchi University  LL.M. – Chengchi University  LL.B. – Chengchi University  A.A. – Tainan Normal School
<b><i>WANG Tze-Chien</i></b>	<i>(Civil Law)</i>  Dr.Iur. – Universität München  LL.M. – Taiwan University  LL.B. – Taiwan University

<b>LIN Young-Mou</b>	<p><i>(Criminal Procedure)</i></p> <p>LL.B. – Taiwan University</p>
<b>LIN Kuo-Hsien</b>	<p><i>(Constitutional Politics)</i></p> <p>R.P.D. – Chinese Culture University</p> <p>Master Degree – Unknown</p> <p>Bachelor Degree – Unknown</p>
<b>Vincent SZE</b>	<p><i>(Commercial Law)</i></p> <p>J.D. – Willamette University</p> <p>M.A. (Journalism) – Oregon University</p> <p>LL.B. – Taiwan University</p>
<b>CHENG Chung-Mo</b>	<p><i>(Administrative Law)</i></p> <p>Dr.Iur. – Universität Wien</p> <p>LL.M. – Waseda University</p> <p>LL.B. – Soochow University</p>
<b>SUN Sen-Yen</b>	<p><i>(Civil Law)</i></p> <p>LL.B. – Taiwan University</p>
<b>CHEN Chi-Nan</b>	<p><i>(Civil Law and Civil Procedure)</i></p> <p>LL.B. – Taiwan University</p>
<b>TSENG Hua-Sun</b>	<p><i>(Administrative Law)</i></p> <p>LL.B. – Taipei University</p>
<b>TUNG Hsiang-Fei</b>	<p><i>(Constitutional Law and Governance)</i></p> <p>M.A. (Politics) – Chengchi University</p> <p>B.A. (Politics) – Taipei University</p>
<b>YANG Huey-Ing</b>	<p><i>(N/A)</i></p> <p>LL.B. – Taiwan University</p>

<b>TAI Tong-Schung</b>	<i>(Civil Law and Legal History)</i>  Dr.Iur. – Universität Mainz  LL.B. – Taiwan University
<b>SU Jyun-Hsiung</b>	<i>(Criminal Law and Legal Philosophy)</i>  Dr.Iur. – Universität Freiburg  LL.M. – Taiwan University  LL.B. – Taiwan University
<b>HWANG Yueh-Chin</b>	<i>(Labour Law)</i>  Dr.Iur. – Universität Wien  LL.M. – Taiwan University  LL.B. – Chengchi University
<b>LAI In-Jaw</b>	<i>(Commercial Law)</i>  S.J.D. – Harvard University  LL.M. – Harvard University  LL.M. – Taiwan University  LL.B. – Taipei University  A.S. – Ilan School of Agriculture
<b>HSIEH Tsay-Chuan</b>	<i>(Civil Law)</i>  LL.M. – Southern Methodist University  LL.B. – Taiwan University

(Source: Compiled by the author)

#### **APPENDIX (E): QUALIFICATIONS OF THE FIFTH-TERM JUSTICES**

<b>JUSTICE</b>	<b>Acad.</b>	<b>Judg.</b>	<b>Barr.</b>	<b>Pros.</b>	<b>Admi.</b>
<b>WENG Yueh-Sheng</b>	○	×	×	×	×



<i>CHAI Shau-Hsien</i>	○	○	×	○	×
<i>YANG Yu-Ling</i>	○	○	×	○	×
<i>LEE Chung-Sheng</i>	○	○	×	○	×
<i>YANG Chien-Hua</i>	○	○	●	●	×
<i>YANG Zu-Zan</i>	○	●	●	●	○
<i>Herbert Han-Pao Ma</i>	○	×	×	×	×
<i>LIU Tieh-Cheng</i>	○	×	×	×	○
<i>CHENG Chien-Tsai</i>	○	○	×	○	×
<i>WU Geng</i>	○	●	×	○	×
<i>SHIH Shen-An</i>	×	○	○	○	×
<i>CHEN Rui-Tang</i>	×	○	×	○	×
<i>CHANG Cheng-Tao</i>	×	○	×	○	×
<i>CHANG Teh-Sheng</i>	○	○	×	○	×
<i>LEE Chih-Peng</i>	○	×	○	×	×
<p><b>Acad. = Academic; Judg. = Judge; Barr. = Lawyer; Pros. = Prosecutor; Admi. = Administrator</b></p> <p>○ = One who is qualified for the profession.</p> <p>● = One who is qualified for the profession but has never occupied the position.</p> <p>×</p>					

(Source: Compiled by the author)

#### APPENDIX (F): QUALIFICATIONS OF THE SIXTH-TERM JUSTICES

JUSTICE	Acad.	Judg.	Barr.	Pros.	Admi.
<i>WENG Yueh-Sheng</i>	○	×	×	×	×
<i>LIU Tieh-Cheng</i>	○	×	×	×	○
<i>WU Geng</i>	○	●	×	○	×

<i>WANG Ho-Hsiung</i>	○	○	×	○	×
<i>WANG Tze-Chien</i>	○	×	×	×	○
<i>LIN Young-Mou</i>	○	○	●	○	×
<i>LIN Kuo-Hsien</i>	○	○	×	○	×
<i>Vincent SZE</i>	○	×	×	×	×
<i>CHENG Chung-Mo</i>	○	×	×	×	○
<i>SUN Sen-Yen</i>	○	○	×	○	×
<i>CHEN Chi-Nan</i>	○	○	●	○	×
<i>TSENG Hua-Sun</i>	○	○	○	○	×
<i>TUNG Hsiang-Fei</i>	○	×	×	×	○
<i>YANG Huey-Ing</i>	×	○	●	○	×
<i>TAI Tong-Schung</i>	○	×	×	×	×
<i>SU Jyun-Hsiung</i>	○	×	×	×	○
<i>HWANG Yueh-Chin</i>	○	×	×	×	×
<i>LAI In-Jaw</i>	○	×	×	×	○
<i>HSIEH Tsay-Chuan</i>	○	○	×	●	×
<p><b>Acad. = Academic; Judg. = Judge; Barr. = Lawyer; Pros. = Prosecutor; Admi. = Administrator</b></p> <p>○ = One who is qualified for the profession.</p> <p>● = One who is qualified for the profession but has never occupied the position.</p> <p>×</p>					

(Source: Compiled by the author)

#### **APPENDIX (G): CAREER AND PREVIOUS PROFESSION OF THE FIFTH-TERM JUSTICE**

<b>JUSTICE</b>	<b>MAIN CAREER</b>	<b>PREVIOUS PROFESSION</b>
<i>WENG Yueh-Sheng</i>	Academic	Professor

		Taiwan University
<b>CHAI Shau-Hsien</b>	Judge	Judge Supreme Court
<b>YANG Yu-Ling</b>	Judge	Director-General Ministry of Justice
<b>LEE Chung-Sheng</b>	Judge	PFDS Committee Judicial Yuan
<b>YANG Chien-Hua</b>	Judge	Vice Secretary-General Judicial Yuan
<b>YANG Zu-Zan</b>	Academic	Professor Taiwan University
<b>Herbert Han-Pao Ma</b>	Academic	Professor Taiwan University
<b>LIU Tieh-Cheng</b>	Academic	Professor Chengchi University
<b>CHENG Chien-Tsai</b>	Judge	Judge Supreme Court
<b>WU Geng</b>	Academic	Professor Taiwan University
<b>SHIH Shen-An</b>	Judge	Judge Supreme Court
<b>CHEN Rui-Tang</b>	Judge	Judge Administrative Court
<b>CHANG Cheng-Tao</b>	Judge	Judge Supreme Court

<b>CHANG Teh-Sheng</b>	Judge	Judge Administrative Court
<b>LEE Chih-Peng</b>	Legislator	Legislator Legislative Yuan

(Source: Compiled by the author)

#### **APPENDIX (H): CAREER AND PREVIOUS PROFESSION OF THE SIXTH-TERM JUSTICE**

<b>JUSTICE</b>	<b>MAIN CAREER</b>	<b>PREVIOUS PROFESSION</b>
<b>WENG Yueh-Sheng</b>	Academic	Professor Taiwan University
<b>LIU Tieh-Cheng</b>	Academic	Professor Chengchi University
<b>WU Geng</b>	Academic	Professor Taiwan University
<b>WANG Ho-Hsiung</b>	Prosecutor	Prosecutor Supreme Procuratorate
<b>WANG Tze-Chien</b>	Academic	Professor Taiwan University
<b>LIN Young-Mou</b>	Judge	Judge Supreme Court
<b>LIN Kuo-Hsien</b>	Judge	Chief Judge Shilin District Court
<b>Vincent SZE</b>	Academic	Professor Chengchi University
<b>CHENG Chung-Mo</b>	Administrator	Minister

		Examination Yuan
<b>SUN Sen-Yen</b>	Judge	Judge Supreme Court
<b>CHEN Chi-Nan</b>	Judge	Judge Supreme Court
<b>TSENG Hua-Sun</b>	Judge	Judge Administrative Court
<b>TUNG Hsiang-Fei</b>	Academic	Representative National Assembly
<b>YANG Huey-Ing</b>	Judge	Judge Supreme Court
<b>TAI Tong-Schung</b>	Academic	Professor Taiwan University
<b>SU Jyun-Hsiung</b>	Academic	Representative National Assembly
<b>HWANG Yueh-Chin</b>	Academic	Minister Control Yuan
<b>LAI In-Jaw</b>	Administrator	Vice Governor Taiwan Province
<b>HSIEH Tsay-Chuan</b>	Judge	President Judicial Academy

(Source: Compiled by the author)

## GLOSSARY

**CONSTITUTION OF 1947.** This refers to the fundamental and supreme law of the Republic of China. It was passed by the Constituent National Assembly on 25 December 1946, promulgated by the Nationalist Government on 1 January 1947 and implemented since 25 December 1947. It was originally designed as the Constitution of the whole of China, and was implemented within the 38 member states of the Republic of China, but now it is only implemented in two member states, Taiwan (entire) and Fujian (part), as a result of the Chinese Civil War. Following the Weimar-Nazi example of the Enabling Act,<sup>452</sup> a temporary state-of-emergency<sup>453</sup> was passed by the National Assembly on 10 May 1948, thus the Constitution reflected the Weimar Constitution – partially suspended because of the Chinese communist rebellion against the Republic until 30 April 1991 (democratisation). However, the separation of powers system was partially and temporarily reorganised after democratisation because the Republic of China no longer consisted of 38 member-states (Additional Articles of the Constitution 1991,<sup>454</sup> 1992,<sup>455</sup> 1994,<sup>456</sup> 1997,<sup>457</sup> 1999,<sup>458</sup> 2000<sup>459</sup> and 2004<sup>460</sup>). These Additional Articles would be immediately invalidated if the reunification of the Republic of China ever occurs.

**NATIONAL ASSEMBLY.** The National Assembly was designed as the specific and exclusive

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<sup>452</sup> Ermächtigungsgesetz (1933).

<sup>453</sup> Temporary Provisions Effective during the Period of Communist Rebellion (1948).

<sup>454</sup> Constitution of R.O.C. amend. (1991).

<sup>455</sup> Constitution of R.O.C. amend. (1992).

<sup>456</sup> Constitution of R.O.C. amend. (1994).

<sup>457</sup> Constitution of R.O.C. amend. (1997).

<sup>458</sup> Constitution of R.O.C. amend. (1999) (declared unconstitutional by the Justices in *Judicial Yuan Interpretation No.499* [2000]).

<sup>459</sup> Constitution of R.O.C. amend. (2000).

<sup>460</sup> Constitution of R.O.C. amend. (2005).

state organ with the power to amend the Constitution, and to elect and impeach the President and Vice President. However, the power of electing and impeaching the President and Vice President was removed in 1994 because of the direct election referendum. The National Assembly finally ceased to exist in 2004, as a result of its task of amending the Constitution being once again taken over by referendum.

**PRESIDENT.** The president is the Head of the Republic of China and the *de facto* head of its executive political body. The President served a six-year term in accordance with the Constitution, but the term of office was shortened into four in 1996. Apart from President Chiang Kai-Shek – who served five terms as President (20 May 1948 to 5 April 1975) because of the Temporary Provisions – all Presidents served no more than two terms. Under normal circumstances, the President is also the chairman of the ruling political party unless he or she resigns from taking the political responsibility for losing an election.

**EXECUTIVE YUAN.** The Executive Yuan is *de jure* the supreme administrative body of the Republic of China in accordance with the Constitution; however, it is *de facto* a state organ which is politically subject to the President. Since 1997, the Additional Articles of the Constitution have empowered the President to appoint the Head of the Executive Yuan exclusively, and the Republic of China has shifted towards the presidential system in reality.

**LEGISLATIVE YUAN.** The Legislative Yuan is designed to be the house of commons of the Republic of China. It is *de facto* the only house of the Republic of China's congress because the Republic of China no longer consists of 38 member-states, so the senate is meaningless at the moment.

**JUDICIAL YUAN.** The Judicial Yuan is the supreme judicial organ of the Republic of China and is much more than a constitutional court. It is actually the only state organ that can decide what the Constitution is, meaning that it has massive constitutional power not only to nullify laws and executive actions but also to modify them. The Judicial Yuan is empowered as the supreme organ in terms of punishing public functionaries. It is also the exclusive organ for dismissing political parties and the ultimate safeguard of local autonomy. In 2000, the Judicial Yuan successfully struck down an unconstitutional constitutional amendment.<sup>461</sup>

**EXAMINATION YUAN.** The Examination Yuan is designed to be an independent branch of government which awards licenses, qualification and certification to candidates who pass national exams. It also controls the civil service system of the Republic of China. Though it is a silent power in politics, it is very influential to individuals because it is the only state organ that can award licenses (including licences to practise law), qualifications (including judge qualifications) and certifications (such as civil service certification) in Taiwan. In other words, it checks-and-balances the other branches of government by awarding licenses, qualifications and certifications under which the other four branches of government recruit new members.

**CONTROL YUAN.** The control Yuan was originally the senate of the Republic of China, set up in accordance with the Constitution. It mainly exercises the power of impeachment and audit independently. The Members of the Control Yuan were originally commissioned by the legislatures of the 38 member-states; however, they are now

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<sup>461</sup> *Judicial Yuan Interpretation No.499* [2000].



appointed by the President since 1992 because the Republic of China no longer consists of 38 member-states.

**CONGRESS.** This refers to the legislature of the Republic of China at the national level in this thesis, although some Taiwanese academics prefer to use the term ‘parliament’. Its Chinese terminology is *Guo Hui*. In Taiwan, congress in its narrowest sense may also refer only to the Legislative Yuan, and its broad sense changes from time to time – it was once a collective of the National Assembly, the Legislative Yuan and the Control Yuan in pre-democracy days (although sometimes the Control Yuan was excluded because of its lesser importance). It consisted of the National Assembly and the Legislative Yuan between 1990 and 2005. Congress has become an accepted synonym for the Legislative Yuan since 2005. Because of Taiwan’s linguistic customs, it is difficult to avoid using the words ‘congress’ or ‘parliament’ in Taiwanese legal studies. This thesis prefers ‘congress’ to ‘parliament’ because Taiwan has turned into a *de facto* presidential system since the 1997 constitutional amendments. Hence, this thesis adopts ‘congress’ for translation but respects other translators who prefer ‘parliament’